EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 01218c

CASE NBR 85-1-05747 CSY
SHORT TITLE Wright, Joel D.
VERSUS Florida

DOCKETED: Oct 2º 1985

Date	Proceedings and Orders
Oct 2º 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Nov 26 1985	Brief of respondent Florida in opposition filed.
Dec 5 1985	DISTRIBUTED. January 10, 1986
Jan 13 1986	REDISTRIBUTED. January 17, 1986
Jan 21 1986	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Blackmun with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

****

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 85-5747

ORIGINAL

JOEL DALE WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

JOEL DALE WRIGHT, petitioner in the above-styled cause hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An Affidavit in Support of Motion to Proceed on Appeal In Forma Pauperis is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: (904) 252-3367

ATTORNEY FOR PETITIONER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOEL WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I JOEL WRIGHT, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on certiorari are the following:

I. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE SUPREME COURT OF FLORID MISAPPLIED THE "HARMLESS ERROR" DOCTRINE IN A CASE WHERE RELEVANT, MATERIAL TESTIMONY OF A DEFENSE WITNESS GOING DIRECTLY TO THE CREDIBILITY OF THE PETITIONER WAS IMPROPERLY EXCLUDED FROM THE TRIER OF FACT DURING TRIAL DUE TO SUMMARY APPLICATION OF A STATE RULE OF PROCEDURE?

II. WHETHER, AS APPLIED, SECTION 921.141 FLORIDA STATUTES VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE FACTUAL FINDINGS CONCERNING THE CRIMES USED TO JUSTIFY THE DEATH SENTENCE WERE MADE WHOLLY BY THE TRIAL JUDGE, AS OPPOSED TO THE JURY THAT RETURNED THE VERDICTS?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. [redacted]

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 4-16-83 $4.50 HR.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

   a. If the answer is yes, describe the property and state its approximate value.

5. List other persons who are dependent upon you for support and state your relationship to those persons.

SUSAN WRIGHT - WIFE - MICHAEL WRIGHT - SON
ROBERT WRIGHT - SON JOSEPH WRIGHT - SON

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JOEL WRIGHT

SUBSCRIBED AND SWORN TO before me this 19 day of Sept. 1985.

Notary public, State of Florida

My commission expires: NOTARY PUBLIC, STATE OF FLORIDA My Commission Expires Sept. 19, 1987

The manner in which the Florida death statute is being applied is really the subtle inverse of the situation found in Ludwig v. Massachusetts, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976), where a two-tier procedure of having a non-jury trial followed by a jury trial passed constitutional muster. In Florida, however, if the jury initially finds the defendant guilty of first degree murder and recommends the appropriate sentence, the judge re-determines the defendant's guilt on the following statutory/factual matters: whether the defendant knowingly created a great risk of death to many persons, committed the capital felony for pecuniary gain, committed the crime to disrupt or hinder the lawful exercise of a governmental function, committed the crime in a cold, calculated, and premeditated manner without any pretense of moral or legal justification and/or; whether the crime was especially heinous, atrocious or cruel. §921.141(5), Fla.Stat. Such a procedure conflicts with the spirit of Williams v. Florida , 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), where the use of a six member jury was approved as being a sufficient number of jurors to meet due process requirements. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Williams, at 100, 26 L.Ed.2d at 460.

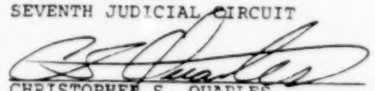
This precise issue has not been addressed by this Court. The constitutional attacks have heretofore not posed a violation of due process caused by a two-tiered process for factual/guilt determinations, where the trial judge decides guilt by applying his own perception of the evidence to statutory elements used to impose the death sentence. Such is the historical function and constitutional purpose of the jury. Certiorari jurisdiction should accordingly be exercised to review this issue on the merits.

CONCLUSION

Because the State of Florida arbitrarily denied the defendant the right to present non-cumulative, relevant testimony from a competent witness in his defense of a charged capital crime, and because the sentence of death was imposed in a manner inconsistent with fundamental notions of due process, Petitioner respectfully asks this Court to grant a Writ of Certiorari

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone (904) 252-3367

MEMBER OF THE BAR OF THE
UNITED STATES SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

Case no. _____

JOEL DALE WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

JOEL DALE WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL
CIRCUIT OF FLORIDA

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER

MEMBER OF THE UNITED STATES
SUPREME COURT BAR

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

JOEL DALE WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTIONS PRESENTED

I. Whether violation of the Sixth Amendment right to present non-cumulative, relevant testimony of a witness who is competent, present and willing to testify at trial can ever be deemed harmless error in a capital trial and, if so, whether such a violation can reasonably be deemed harmless where the testimony improperly excluded from the jury bore directly on the credibility of the defendant in a case where credibility of the defendant was the critical issue.

II. The two-tiered procedure used to impose the death sentence in Florida violates the Sixth and Fourteenth Amendments, where factual/guilt findings used to impose the death sentence are made wholly by the trial judge, as opposed to the jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this Petition is reported as Wright v. State, 10 FLW 364 (Fla. 1985). It is the first item set forth in the appendix hereto (Appendix "A").

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion in this case on July 3, 1985 (Appendix "A"). Rehearing was denied August 30, 1985, and the mandate issued October 7, 1985 (Appendix "B"). Petitioner asserted below and asserts here a deprivation of his rights guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confer certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mr. JOEL DALE WRIGHT (hereafter Petitioner) was tried by jury in the Circuit Court for Putnam County, Florida for the crimes of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. At the conclusion of the evidentiary stage of trial, before closing argument and jury instructions, Petitioner sought to introduce the testimony of a witness who, after talking with several persons, learned that she possessed relevant information and so notified the defense attorney. After a proffer (Appendix "F") the trial judge suppressed the testimony, finding that the witness had violated Florida's rule of witness sequestration. (Appendix "F", p67-68)

Petitioner was convicted of all crimes charged and sentenced to death for the murder conviction (Appendix "C"). In this regard, the jury returned the verdicts on a standardized verdict form (Appendix "D") and by a 9 to 3 majority summarily recommended death (Appendix "E"). The judge, in justifying the death sentence, thereafter set forth detailed findings of law and fact (Appendix "C").

The convictions and sentences were affirmed by the Supreme Court of Florida after timely appeal (Appendix "A"). In dealing with the issue concerning exclusion of the defense witness' testimony at trial, the Supreme Court of Florida held that it was harmless to exclude defense testimony from the jury, stating, "Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt." (emphasis added)

In dealing with the issue on appeal contending that the death sentence was unconstitutionally applied in this case because the findings of fact/guilt supporting imposition of the sentence were made by the judge, as opposed to the jury of Petitioner's peers, the Supreme Court of Florida stated that this argument "[had] previously been considered and expressly rejected."

STATEMENT OF THE FACTS

The body of a 75 year old woman was found in her home on February 6, 1983. Testimony established that she had died between the evening of February 5 and the morning of February 6 after being stabbed and raped. Charles Westberry, the State's key witness, claimed that during the daylight hours on the morning of February 6, Petitioner (hereafter Wright) came to his (Westberry's) residence and admitted killing the victim.

Wright testified at trial, disclaiming any knowledge of the crimes or of the admission of guilt allegedly given Westberry. Wright related he had attended a party on the evening of February 5, 1983, and then gone to his parents' home, which neighbored the victim's house. (This testimony was corroborated by State witnesses). Wright further testified that he was locked out of his parents' house, so he walked on Highway 19 to Westberry's house around 1:00 a.m. (This testimony was totally uncorroborated at trial).

Mrs. Kathy Waters learned the substance of Wright's testimony by talking to friends who had viewed the trial. Remembering that she had personally seen a person who could have been Wright at the time and place he claimed to be, Waters notified the defense counsel, who immediately sought to introduce Water's testimony. Neither closing argument nor jury instructions had yet occurred. After noting that the testimony was almost "tailor made", the trial judge ruled Water's testimony inadmissible because, by talking to members of the audience of Wright's trial who had heard testimony, Water's had violated Florida's rule of witness sequestration.

The Supreme Court of Florida deemed the exclusion of Water's testimony improper but harmless because it would not have required finding Wright innocent. Weighing the testimony, the Court concluded that Water's testimony would not have affected the verdict, as opposed to whether Water's testimony reasonably might have.

REASONS FOR GRANTING THE WRIT

I.

WHETHER VIOLATION OF THE SIXTH AMENDMENT RIGHT TO PRESENT NON-CUMULATIVE, RELEVANT TESTIMONY OF A WITNESS WHO IS COMPETENT, PRESENT AND WILLING TO TESTIFY AT TRIAL CAN EVER BE DEEMED HARMLESS ERROR IN A CAPITAL TRIAL AND, IF SO, WHETHER SUCH A VIOLATION CAN REASONABLY BE DEEMED HARMLESS WHERE THE TESTIMONY IMPROPERLY EXCLUDED FROM THE JURY BORE DIRECTLY ON THE CREDIBILITY OF THE DEFENDANT IN A CASE WHERE CREDIBILITY OF THE DEFENDANT WAS THE CRITICAL ISSUE.

In Washington v. Texas, 388 U.S. 14 (1967), this Court held that the right of an accused to have compulsory process for obtaining witnesses in his favor is so fundamental and essential to a fair trial that the Sixth Amendment right is incorporated into the due process clause of the Fourteenth Amendment, so as to be applicable to state trials. In Washington, this Court reversed a murder conviction obtained after the State, applying a state rule of procedure, excluded testimony relevant to the defense. This Court stated:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to evidence that he had personally observed, and his testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.

Washington v. Texas, 388 U.S. at 23. (emphasis added)(Appendix "H") Florida's rule of witness sequestration is used to exclude from the jury relevant testimony of witnesses who are competent, present, and willing to testify to evidence they have personally observed. See Braswell v. Wainwright, 463 So.2d 1148 (5th Cir. 1972). Arbitrary exclusion of relevant, non-cumulative testimony from a competent witness who is present and willing to testify to what he personally observed is so repugnant to due process and the right to present evidence in your own behalf that it can never be deemed harmless in a capital trial.

The Supreme Court of Florida in the instant capital case conceded that the trial court erred in summarily preventing the defendant from exercising his right to present relevant, material evidence to the jury at trial, but theorized that only "harmless error" occurred because some of the excluded testimony was cumulative. The portion that was not cumulative, "...if accepted by the jury, would [not] require a finding by the jury that [Wright] did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt." Wright, supra, at 366 (citations omitted, emphasis added) (Appendix "A" p.3).

Though citing to Chapman v. California, 386 U.S. 18 (1967), the Supreme Court of Florida deemed that the improper exclusion of relevant, material evidence from the trier of fact at trial was harmless error because "the excluded evidence would not have affected the verdict at trial." The court patently applied the wrong test to determine harmless error. The standard set forth in Chapman is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman at 24. See also United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); Fahay v. Connecticut, 375 U.S. 85 (1963). The test is not whether the evidence would have changed the verdict; it is instead whether it reasonably could have. The distinction is fundamental.

Although the excluded testimony may not have "required" the jury to return a verdict of not guilty in the instant case, it cannot reasonably be said that the corroborating testimony excluded from the trier of fact might not reasonably have contributed to the conviction. The evidence of guilt was weak and circumstantial. The case boiled down to Charles Westberry's word versus the word of Jody Wright. Wright testified he neither committed the crimes nor told Westberry that he had committed them. The time element was crucial, because Wright stated he arrived at Westberry's home around 1:00 a.m., whereas Westberry claimed Wright arrived at daybreak. Wright's testimony

concerning the time and route that he took to Westberry's home was wholly uncorroborated absent the excluded testimony of Waters who would have testified that she personally observed someone, possibly Wright, where and when he claimed to be. As in Braswell, supra, the excluded testimony went squarely to the credibility of the defendant. An appellate court simply cannot tell what weight the jury would have given this corroborating testimony, and the court cannot in good faith state that the absence of this testimony might not reasonably have contributed to the conviction of Wright.

The Supreme Court of Florida is here substituting its opinion for that of the jury; weighing the testimony from a written record in order to justify application of a state rule of procedure allowing arbitrary exclusion of relevant defense testimony. Pursuant to the Wright decision, the courts of Florida will apply the harmless error rule where relevant,non-cumulative testimony is improperly excluded from the trier of fact unless it can be shown that the excluded evidence would have "required" a verdict of not guilty, even though the rule of procedure used to exclude the testimony was improperly and arbitrarily applied. Review on the merits is appropriate due to the importance of the question presented.

II

THE TWO-TIERED PROCEDURE USED TO IMPOSE THE DEATH SENTENCE IN FLORIDA VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS, WHERE FACTUAL/GUILT FINDINGS USED TO IMPOSE THE DEATH SENTENCE ARE MADE WHOLLY BY THE TRIAL JUDGE, AS OPPOSED TO THE JURY.

In rejecting this point on appeal, the Supreme Court of Florida summarily stated that this argument had previously been considered and rejected, citing Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied 454 U.S. 882 (1981); Proffitt v. Florida, 428 U.S. 242 (1976), aff'g 315 So.2d 461 (Fla. 1975).

In Proffitt, this Court "granted certiorari. . .to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Proffitt, supra at 247, 49 L.Ed.2d at 920 (emphasis added). The question of whether it was a denial of due process for the trial judge to make anew factual/guilt determinations concerning the crime, as opposed to the jury, was neither presented to nor considered by this Court.

Similarly, when this Court declined to exercise certiorari jurisdiction in Johnson v. State, 442 So.2d 185 (Fla. 1983), the constitutional challenge of Florida's death penalty statute was addressed to cruel and unusual punishment contentions under the Eighth and Fourteenth Amendments, as opposed to assertions of a denial of due process guaranteed by the Sixth and Fourteenth Amendments. See Johnson v. Florida, 454 U.S. 882. The instant argument has never been expressly considered by this Court.

The argument is basic and fundamental. The Sixth Amendment guarantees the accused in all criminal prosecutions a trial by jury on issues of guilt. This constitutional provision as an element of due process is applied to the States through the Fourteenth Amendment in cases punishable by six months imprisonment or more and/or by a fine of $500.00. Duncan v. Louisiana 391 U.S. 145 (1968).

> The Framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan, supra at 156, 20 L.Ed.2d at 500.

In Florida the jury renders a verdict by applying the facts to statutory elements. Thereafter, in a capital case, under §921.141(2), Fla.Stat., the jury is required to "deliberate and render an advisory sentence to the court, based upon. . . : (a) whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) based on those considerations, whether the defendant should be sentenced to life imprisonment or death." (emphasis added)(Appendix "C").

This statute is applied whereby the jury, by a specified margin, issues only a generic recommendation of life or death with no findings of specific facts and/or particular aggravating or mitigating circumstances (Appendix "E"). The judge, however, subsequently enters an order setting forth specific findings covering facts of the crime and the existence of aggravating or mitigating circumstances based upon his perception of the testimony and evidence (Appendix "C"). What the judge is in fact doing is rendering a verdict concerning the defendant's guilt of statutory elements.

The advisory role of the jury is not the issue here, as it was in Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 35 Cr.L. 3199 (1984). Petitioner does not dispute that the trial judge may impose the appropriate sentence, and that in doing so disregard a life recommendation by the jury. Petitioner contests the judge's ability to constitutionally impose the sentence based upon his own findings of fact rather than those of the jury of the defendant's peers. Simply said the judge is rendering a verdict of guilt that should be made by the jury.

ty dollars ($20) court costs on each case (a total of $60) court costs.

[Respondent's] conduct in this matter was directly related to the psychological and emotional condition of [respondent], which is now being professionally treated. The Florida Bar, Case No. 06B84H49, which is presently before the Pasco County Grievance Committee, Sixth Judicial Circuit, "B", is based upon the conduct that was the subject of criminal charges.

3. The [respondent] hereby waives confidentiality of this proceeding and of all pending disciplinary matters, pursuant to Florida Bar Integration Rule, article XI, Rule 11.12(1)(a).

4. [Respondent] agrees to cooperate fully with investigations made in connection with the Client Security Fund of The Florida Bar.

5. [Respondent] will make all reasonable efforts to reimburse those who suffered monetary losses as a result of his failure to perform in his professional capacity or professional misconduct. [Respondent] will also make all reasonable efforts to reimburse the Client Security Fund of The Florida Bar for payments made by the Fund as a result of his conduct.

6. [Respondent] freely and voluntarily submits this Petition to Resign and further agrees that it is without leave to reapply for readmission for a period of three (3) years or until such time as [respondent] has completed his term of probation and both The Florida Bar and [respondent's] primary treating psychologist feel that [respondent] is emotionally capable of resuming the active practice of law.

The Florida Bar having stated that it does not oppose the Petition for Leave to Resign and the Court having reviewed the Petition and determined that the requirements of Rule 11.08(3) are fully satisfied, the Petition for Leave to Resign is hereby approved. This resignation shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients and respondent shall not accept any new business.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

• • •

Attorneys—Discipline—Conduct involving dishonesty, fraud, deceit or misrepresentation—Conduct adversely reflecting on fitness to practice law—Suspension

THE FLORIDA BAR, Complainant, vs. DONALD J. SWANSON, Respondent. Supreme Court of Florida. Case No. 65,819. July 3, 1985. Original Proceeding—The Florida Bar, John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida, and Jacquelyn Pleasner Needelman, Bar Counsel, Fort Lauderdale, Florida, for Complainant. Robert J. O'Toole, Fort Lauderdale, Florida, for Respondent.

(PER CURIAM.) This disciplinary proceeding by The Florida Bar against Donald J. Swanson, a member of The Florida Bar, is presently before us on complaint of The Florida Bar and report of referee. Pursuant to article XI, Rule 11.06(9)(b) of the Integration Rule of The Florida Bar, the referee's report and record were duly filed with this Court. No petition for review pursuant to Integration Rule of The Florida Bar 11.09(1) has been filed.

Having considered the pleadings and evidence, the referee found respondent guilty of Count One of the Complaint of The Florida Bar as to each ethical violation: Disciplinary Rule 1-102(a)(1)—A lawyer shall not violate a disciplinary rule; Disciplinary Rule 1-102(a)(4)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and Disciplinary Rule 1-102(a)(6)—A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law. The referee further found respondent not guilty as to Count Two of the Complaint of The Florida Bar as to each of the same ethical violations.

The referee recommends that respondent be suspended from the practice of law for a fixed period of twelve months and thereafter until:

1. He shall prove his rehabilitation pursuant to Rule 11.10(4).

2. Enroll in, and successfully complete with a grade of no less than "C", or its equivalent, from an accredited law school in the State of Florida, a course in Ethical Conduct by attorneys authorized to practice law in the State of Florida;

3. Pay the costs of these proceedings in the amount of $1,442.63.

Having carefully reviewed the record, we approve the findings and recommendations of the referee.

Accordingly, respondent, Donald J. Swanson is suspended from the practice of law for a period of twelve (12) months on the conditions set forth above. Respondent's suspension shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients. Respondent shall not accept any new business.

Judgment for costs in the amount of $1,442.63 is hereby entered against respondent, for which sum let execution issue.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

• • •

Criminal law—Murder—Death penalty—Error to exclude testimony of witness who came forward on own volition after attending portions of trial, following newspaper accounts of trial and discussing testimony with various persons who attended trial without conducting inquiry as to whether inadvertent violation of sequestration rule affected witness' testimony—Error harmless under circumstances—Evidence of defendant's participation in prior burglary of victim's home utilizing identical point of entry used on date of victim's murder properly admitted—Sentencing—Aggravating circumstances—Proper to find murder committed after rape and burglary and murder heinous, atrocious and cruel—Proper to find murder committed for purpose of avoiding arrest where evidence reflected that defendant murdered victim because she could identify him and he did not want to return to prison—Error to find murder committed in cold, calculated and premeditated manner—Death sentence properly imposed—Imposition of death penalty proportionately correct

JOEL DALE WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 64,391. July 3, 1985. An Appeal from the Circuit Court in and for Putnam County, James B. Gibson, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant. Jim Smith, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

(PER CURIAM.) The appellant, Joel Dale Wright, was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. In accordance with the jury's sentence recommendation, the trial judge imposed the death sentence for the first-degree murder. The appellant also received sentences of 99 years for sexual battery, 15 years for burglary, and 5 years for grand theft. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and sentences.

The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the vic

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App. "A"

tim, that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat, and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the jury on the *Williams* rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made," after the witness has conferred with numerous people concerning the case. The jury found appellant guilty as charged.

Appellant, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year-old psychological report which indicated that at that time appellant was depressed, emotionally immature, and had difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that appellant receive the death sentence.

Guilt Phase

The appellant challenges his first-degree murder conviction on the grounds that the trial court erred in (1) restricting appellant's right to cross-examine several witnesses, (2) permitting a witness to comment upon appellant's exercise of his right to remain silent, (3) restricting defense counsel's final argument and/or refusing to instruct the jury on the law governing circumstantial evidence, (4) refusing to allow the appellant to present the testimony of Kathy Waters, and (5) instructing the jury to consider evidence of appellant's prior burglary of the victim's house. Appellant also challenges his grand theft conviction on the ground that the corpus delicti was not established other than by appellant's confession. We reject each of appellant's contentions and find only the issues relating to the exclusion of Waters' testimony and the admissibility of the *Williams* rule evidence merit discussion.

With regard to the first issue for discussion, appellant contends it was reversible error for the trial judge to deny the proffered witness an opportunity to testify. The record reveals that, during the hearing held by the trial court on the matter, the defense asserted that Waters' observation of three persons in the vicinity of the victim's home and one person walking on State Road 19 was relevant and exculpatory in that it tended to corroborate appellant's otherwise uncorroborated testimony and could imply to the jury that others had an opportunity to break into the victim's home and kill her. While acknowledging that "there is no question that the violation of the rule [of sequestration] was inadvertent," the state argued that it "could very well be substantially prejudiced" if the witness was permitted to testify. The transcript of the hearing also reflects that the excluded witness did not become aware of the fact that she possessed relevant information until the morning her testimony was proffered, at which time she came forward of her own volition. In ruling to exclude the evidence, the trial judge attributed no "bad motive or bad faith" to the defense in its failure to proffer the testimony before the close of the evidence.

In declaring that the sequestration rule would be rendered "meaningless" if the witness were allowed to testify, it is clear that the trial judge applied that rule as a strict rule of law. This Court has frequently pointed out that the rule of sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding. *See Steinhorst v. State*, 412 So.2d 332 (Fla. 1982); *Odom v. State*, 403 So.2d 936 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); *Dumas v. State*, 350 So.2d 464 (Fla. 1977); *Spencer v. State*, 133 So.2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962). We have expressly stated the rule must not be enforced in such a manner that it produces injustice. *Steinhorst v. State*, 80 Fla. 309, 86 So. 204 (1920). Further, we have recognized that enforcement of the rule against a defendant seeking to introduce the testimony of a witness who has heard testimony in violation of the rule implicates the defendant's sixth amendment right to present witnesses in his own behalf. *See Steinhorst, cf. Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). Before it excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness's testimony was affected by other witnesses' testimony to the extent that it substantially differs from what it would have been had the witness not heard the testimony. Because of the sixth amendment ramifications, the court must carefully apply this test before it excludes any material testimony offered by a defendant in a criminal case, and should also consider whether the violation of the rule of sequestration was intentional or inadvertent and whether it involved bad faith on the part of the witness, a party, or counsel. In the instant case, the trial judge found the violation was inadvertent, but failed to evaluate whether or not Waters' testimony was affected to any substantial degree by her presence in the courtroom or conversations with trial spectators. We realize that trial courts must of necessity, have discretion in the enforcement of the rule of sequestration. In the instant case, we find the trial judge erred in failing to exercise his discretion to determine whether exclusion was warranted under the circumstances, and, instead, applied the sequestration rule as a strict rule of law.

Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house, that an individual of the appellant's general description was walking in the opposite direction from the victim's home, and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contained uncontroverted testimony that three individuals were gathered near the vi

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tim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. *See United States v. Hasting*, 461 U.S. 499 (1983); *Chapman v. California*, 386 U.S. 18 (1967); *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984); *Cf. United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2340 (1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

The second issue concerns appellant's assertion that the trial court committed reversible error by allowing the jury to consider evidence of a prior crime committed by appellant "for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant."* In *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959), this Court held that evidence of another crime is admissible when relevant to prove a material issue, unless it is relevant only to show bad character or propensity. *See also Shriner v. State*, 386 So. 2d 525 (Fla. 1980), *cert. denied*, 449 U.S. 1103 (1981); *Ashley v. State*, 265 So. 2d 685 (Fla. 1972). The *Williams* holding is codified by section 90.404(2)(a), Florida Statutes (1983), and incorporated into Florida Standard Jury Instructions. In *Drake v. State*, 400 So. 2d 1217 (Fla. 1981), we stated that to be legally relevant to show identity, it is not enough that the factual situations sought to be compared bear a "general similarity" to one another. Rather, the situations must manifest "identifiable points of similarity." *Id.* at 1219. We find the evidence that appellant had previously burglarized the victim's house and, in so doing, had utilized the identical point of entry used on the date of the victim's murder, is, under the *Williams* rule, legally relevant to show identity and to show that Wright knew that point of entry was available. We also note that appellant utilized this evidence in testifying that his fingerprint had been left in the victim's bedroom when he and Paul House burglarized her residence.

Sentencing Phase

In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary, (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, (3) the murder was especially heinous, atrocious, and cruel, (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances. The appellant raises four challenges to the sentencing phase of his trial: (1) the trial court erred in finding that the murder was committed for the purpose of preventing a lawful arrest, (2) the trial court erred in finding that the murder was cold, calculated, and premeditated, (3) section 921.141, Florida Statutes (1983), violates the federal constitution by depriving the appellant of his right to a trial by his peers, and (4) Florida's capital sentencing statute is unconstitutional on its face and as applied. We have previously considered and expressly rejected the latter two arguments. *See, e.g., Johnson v. State*, 393 So. 2d 1069 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981); *Proffitt v. Florida*, 428 U.S. 242 (1976), *aff'g* 315 So. 2d 461 (Fla. 1975).

Appellant's first contention is without merit. He argues that, because the victim was not a law enforcement officer, the trial judge's finding that the murder was committed to prevent arrest is defective because it fails to show that the dominant motive was the elimination of a witness. The record reflects that Westberry testified appellant admitted he killed the victim because she recognized him and he did not want to return to prison. This evidence supports the trial judge's finding that appellant committed the capital felony for the purpose of avoiding arrest. *See Clark v. State*, 443 So. 2d 973 (Fla. 1983), *cert. denied*, 104 S. Ct. 2400 (1984); *Johnson v. State*, 442 So. 2d 185 (Fla. 1983), *cert. denied*, 104 S. Ct. 2182 (1984); *Vaught v. State*, 410 So. 2d 147 (Fla. 1982).

We agree with appellant's assertion that the trial court erred in finding the murder to be cold, calculated, and premeditated. This aggravating circumstance is generally found in murders that, by their nature, exhibit a heightened degree of premeditation, such as contract or execution-style murders. *See Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *Washington v. State*, 432 So. 2d 44 (Fla. 1983); *McCray v. State*, 416 So. 2d 804 (Fla. 1982). Such heightened premeditation was not proved beyond a reasonable doubt in this case. Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct and find it unnecessary to remand for a new sentencing hearing. *See James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 105 S. Ct. 608 (1984); *White v. State*, 403 So. 2d 331 (Fla. 1981), *cert. denied*, 103 S. Ct. 3571 (1983); *Demps v. State*, 395 So. 2d 501 (Fla.), *cert. denied*, 454 U.S. 933 (1981); *Elledge v. State*, 346 So. 2d 998 (Fla. 1977). We also find the imposition of the death penalty in this case is proportionately correct. *See, e.g., Stewart v. State*, 420 So. 2d 862 (Fla. 1982), *cert. denied*, 460 U.S. 1103 (1983); *Booker v. State*, 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 957 (1981); *King v. State*, 390 So. 2d 315 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981), *receded from on other grounds, Strickland v. State*, 437 So. 2d 150 (Fla. 1983).

For the reasons expressed, we affirm appellant's convictions and sentence of death.

It is so ordered. (BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur.)

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*See Fla. Std. Jury Instr. (Crim.), "Williams Rule." That instruction reads:

The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.

However, the defendant is not on trial for a crime that is not included in the [information] [indictment].

We agree with appellant that the trial judge would have been well-advised to limit his instruction to those bracketed elements that were applicable under the facts of the case; however, the judge's failure to so limit the instruction was not error.

* * *

Attorneys—Discipline—Permanent resignation pending disciplinary proceedings

THE FLORIDA BAR, Complainant, vs. LLOYD AUSTIN LYDAY, Respondent. Supreme Court of Florida. Case No. 66,367. July 3, 1985. Original Proceeding—The Florida Bar, David R. Ratnoff, Bar Counsel, Tampa, Florida, for Complainant; Edwin T. Mulock of Mulock and Birkhold, Bradenton, Florida, for Respondent.

(PER CURIAM.) This matter is before the Court on respondent's Petition and Amended Petition for Leave to Resign pending disciplinary proceedings, pursuant to article XI, Rule 11.08 of the Integration Rule of The Florida Bar.

Respondent states in his petition that Florida Bar Case Nos. 12B85H38 and 12B85H39 are pending against him and Florida Bar Case No. 12B85H02 was a past disciplinary action against him which was resolved by an admission of minor misconduct which was accepted by the grievance committee. Respondent further states that there are no original proceedings pending against him and that his resignation is of a permanent nature.

The Florida Bar filed its response stating that it supports respondent's Amended Request for Leave to Resign permanently and that

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Supreme Court of Florida

FRIDAY, AUGUST 30, 1985

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,391

Circuit Court No. 83-376CF-M (Putnam)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant, and reply thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that Appellant's Motion for Oral Argument on Motion for Rehearing is denied.

A True Copy

TEST:

Clerk, Supreme Court

TC
cc: Hon. Edward L. Brooks, Clerk
Hon. Robert R. Perry, Judge

Larry B. Henderson, Esquire
Margene A. Roper, Esquire

App. "B"

S.C. 61 [illegible]463

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA.

CASE NO. 83-376-CF-M

STATE OF FLORIDA

vs.

JOEL DALE WRIGHT,

Defendant.

JUDGMENT AND SENTENCE

The Defendant, JOEL DALE WRIGHT, was tried and found guilty by a jury of murder in the first degree of Lima Paige Smith.

The Court has considered the evidence including the testimony heard during the August 22, 1983, trial, reviewed the presentence investigative report, and the jury's advisory sentence recommending imposition of the sentence of death.

The Defendant, JOEL DALE WRIGHT, having been tried and found guilty of the crime of murder in the first degree of Lima Paige Smith, is hereby adjudicated guilty of the crime of murder in the first degree.

MITIGATING CIRCUMSTANCES

(A) WHETHER THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FINDING:

As a juvenile, the Defendant came to the attention of the juvenile authorities on two separate occasions, for crimes involving theft. On both occasions, in 1974 and 1975, the Defendant was committed to the custody of the Division of Youth Services, and placed in one of their facilities.

In 1977, the Defendant was convicted of breaking and entering an automobile in North Charleston, South Carolina, and was sentenced to two years incarceration, which sentence was then suspended and was placed on three years probation.

In the succeeding three years, the Defendant encountered law enforcement on five occasions, and was committed to the custody of

FILED IN OPEN COURT
THIS 23rd DAY OF Sept 1983 7a.m.
Charles H. Hand
Asst. Clerk

A 5

83-5747

CERTIFICATE OF SERVICE

I, CHRISTOPHER S. QUARLES, a member of the Bar of the Supreme Court of the United States and counsel of record for JOEL DALE WRIGHT the Petitioner, hereby certify that on October 29, 1985, pursuant to Supreme Court Rule 28. I served a single copy of the foregoing Petition for Writ of Certiori to the Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Daytona Beach, Florida, with first class postage prepaid, properly addressed to JIM SMITH, Attorney General, Department of Legal Affairs, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.

BY: C. Quarles
CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER

Sworn to and subscribed before me
this 29th day of October, 1985.

Marla K Gilbert
Notary Public, State of Florida

My commission expires:
Notary Public, State of Florida
My Commission Expires Sept. 20, 1987
Bonded Thru Troy Fain - Insurance, Inc.

[redacted]TIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, Department of Legal Affairs, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Joel Dale Wright, Inmate No. 749768, Florida State Prison, P.O. Box 747, Starke, Florida 32091 on this 29th day of October 1985.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Putnam County, Florida

WHEREAS, in that certain cause filed in this Court styled

JOEL DALE WRIGHT vs. STATE OF FLORIDA

RECEIVED
OCT 11 1985
PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Case No 64,391

Your Case No 83-376CF-M

The attached opinion was rendered on July 3, 1985.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Joseph A. Boyd, Jr.

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital,

on this 7th day of October, 1985

Clerk of the Supreme Court of Florida

☐ PROBATION VIOLATOR
(Check if Applicable)

83 CF 477

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA

DIVISION M

CASE NUMBER 83-376-CF

STATE OF FLORIDA

—vs—

JOEL DALE WRIGHT

Defendant

JUDGMENT

The Defendant JOEL DALE WRIGHT, being personally before this Court represented by Howard Pearl, Assistant Public Defender, his attorney of record, and having

(Check Applicable Provision)

- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty to the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
II	SEXUAL BATTERY	794.011(3)	LF	83-376-CF
III	BURGLARY OF DWELLING	810.02(3)	2nd	83-376-CF
IV	GRAND THEFT OF THE SECOND DEGREE	812.014	3rd	83-376-CF

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

☐ The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).
(This provision is optional, not applicable unless checked)

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of $_____ pursuant to F.S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s).)

☐ The Court hereby imposes additional court costs in the sum of $_____

FILED IN OPEN COURT
THIS 23rd DAY OF Sept 19 83
Charles H. Hood
CLERK CIRCUIT COURT

715

83 CF 478

Imposition of Sentence Stayed and Withheld (Check if Applicable)

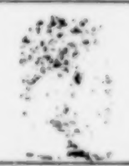
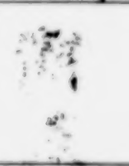
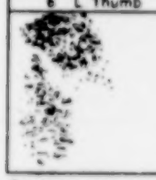
☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date (Check if Applicable)

☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT

1 R Thumb	2 R Index	3 R Middle	4 R Ring	5 R Little
				
6 L Thumb	7 L Index	8 L Middle	9 L Ring	10 L Little
				

Fingerprints taken by

Name and Title

DONE AND ORDERED in Open Court at Palatka in Putnam County, Florida, This 23rd day of September A.D., 19 83. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Joel Dale Wright, and that they were placed thereon by said Defendant in my presence in Open Court this date.

JUDGE

716

Bk. 61 Pg. 475

Defendant Joel Dale Wright

Case Number 83-376-CF-M

SENTENCE

(As to Count II)

The Defendant, being personally before this Court, accompanied by his attorney, Howard Pearl, Asst. Public Def., and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that,

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.
(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life
☒ For a term of NINETY-NINE (99) YEARS
☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these two paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☒ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of one-third. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 158 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run ☒ consecutive to ☐ [illegible] with sentence imposed in Count I, Case # 83-376-CF-M, Putnam County, Florida.

Bk. 61 Pg. 480

Defendant Joel Dale Wright

Case Number 83-376-CF-M

SENTENCE

(As to Count III)

The Defendant, being personally before this Court, accompanied by his attorney, Howard Pearl, Asst. Public Defender, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that,

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.
(Name of local corrections authority to be inserted at printing, if other than Sheriff)

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life
☒ For a term of FIFTEEN (15) YEARS
☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these two paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction ☒ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of one-third. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of none credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/Concurrent It is further ordered that the sentence imposed for this count shall run ☒ consecutive to ☐ concurrent with [illegible] with sentence imposed in Count II, Case # 83-376-CF, Putnam County, Florida.

CASE NO: 83-376-CF-M

THE STATE OF FLORIDA

VS.

JOEL DALL WRIGHT,

Defendant.

VERDICT

September 1, 1983
Palatka, Florida

We, the Jury, find as follows, as to Count I of the Indictment:
(check only one as to this count)

__✓__a. The Defendant is GUILTY of First Degree Murder as charged in the Indictment.

____b. The Defendant is GUILTY of Second Degree Murder.

____c. The Defendant is GUILTY of Manslaughter.

____d. The Defendant is NOT GUILTY.

We, the Jury, find as follows, as to Count II of the Indictment:
(check only one as to this count)

__✓__a. The Defendant is GUILTY of Sexual Battery with force likely to cause serious personal injury as charged in the Indictment.

____b. The Defendant is GUILTY of Sexual Battery with force not likely to cause serious personal injury.

____c. The Defendant is GUILTY of Battery.

____d. The Defendant is NOT GUILTY.

We, the Jury, find as follows, as to Count III of the Indictment:
(check only one as to this count)

__✓__a. The Defendant is GUILTY of Burglary of a Dwelling as charged in the Indictment.

____b. The Defendant is GUILTY of Trespass.

____c. The Defendant is NOT GUILTY.

We, the Jury, find as follows, as to Count IV of the Indictment:
(check only one as to this count)

__✓__a. The Defendant is GUILTY of Grand Theft of the Second Degree as charged in the Indictment.

____b. The Defendant is GUILTY of Petit Theft.

____c. The Defendant is NOT GUILTY.

SO SAY WE ALL.

FILED IN OPEN COURT
This 10th Day of Sept 1983
CHARLES H. HOOD
CLERK CIRCUIT COURT
Case 83-376CF BDB
Dep. Clk.

H W Pritchett Sr
FOREMAN.

App. "D"

[redacted]

(83-386 (

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA.
CASE NO. 83-376-CF-M

STATE OF FLORIDA,

vs.

JOEL DALE WRIGHT.

Sept 2 1983

A MAJORITY OF THE JURY, BY A VOTE OF 9 to 3
ADVISE AND RECOMMEND TO THE COURT THAT IT IMPOSE THE DEATH
PENALTY UPON JOEL DALE WRIGHT.

H W Pritchett Sr
FOREMAN

FILED IN OPEN COURT
This 2nd Day of Sept 1983
CHARLES H. HOOD
CLERK CIRCUIT COURT
Case 83-376CF BDB
Dep. Clk.

App. "E"

today.

We'll be in recess until further call, Captain Johnson.

(The following took place in chambers, out of the presence of the jury.)

THE COURT: Let us reflect that we're in chambers, out of the presence of the jury.

MR. DUNNING: And that the Defendant is present.

THE COURT: And the Defendant is present represented by his Counsel.

Mr. Pearl, you have a motion which you wish to bring before the Court?

MR. PEARL: Yes. May it please the Court?

The Defendant moves for leave to re-open his case in chief on the basis of newly discovered and hitherto unsuspected evidence.

This morning, Your Honor, during the short break we took to wait for the witness Mr. Ryster to come to Court I was approached by this lady whose name is Mrs. Waters, and she gave me information that she had concerning this case which no one knew about.

I did not know of her existence. She has not, as far as I know, been interviewed by any

law enforcement agency or by any representative, either the Public Defender or the State Attorney's office.

The gist of her --

THE COURT: Would it not be better, Mr. Pearl, to present the evidence in question and answer form?

MR. PEARL: Yes, of course. I would be perfectly happy to. One moment.

MR. DUNNING: Could you tell me her first name?

A VOICE: Kathy.

MR. PEARL: Yeah. I'll go with it now.

THE COURT: All right, sir. Wait one moment.

Miss Waters, would you raise your right hand.

KATHY WATERS,

having been produced and first duly affirmed to tell the truth, testified as follows:

THE COURT: Mr. Pearl, the witness is with you for direct examination on the proffer, sir.

MR. PEARL: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PEARL:

Q Miss Waters, why do you affirm rather than swear?

A Because I'm a christian, and I don't believe a person ought to swear, because the Bible tells us not to.

Q All right, ma'am. Miss Waters, where do you live?

A On Moody Road.

Q Here in Palatka?

A Yes, sir.

Q All right. Now, when did you and I meet for the first time?

A Just a few minutes ago, about fifteen minutes ago.

Q Here in the courthouse?

A Yes, sir.

Q All right, ma'am. Now, would you please -- now, have you heard and been sitting in the courtroom during any part of this trial?

A Just today. I heard the end of, I think it was Taylor Douglas's thing, and I don't even know what he said. And the Hughes boy.

Q Had you been in the courtroom listening to this trial before?

A No, sir.

Q What brought you here, why did you come to the trial today?

A Because my sister came home -- see, my sister's been coming, and then she called me last night.

Q Okay. What's your sister's name?

A Wanda Pussell. And Mary Jo Harrell and Sherry Rigdon, they've all been coming off and on.

Q Okay. As spectators?

A Yes, sir.

Q All right.

A And they -- last night Wanda -- well, she was supposed to call me, and she didn't, so I called her about we're supposed to get together Saturday night. And I asked her, I said, Well, what happened today.

And she says, Well, they've adjourned the jury and they're going to bring in the verdict tomorrow.

And so I wanted to come in to hear the verdict.

THE COURT: What is the other sister's name? Wanda, Sherry Rigdon, and who?

THE WITNESS: Mary Jo Harrell.

Wanda's not here today, she's keeping my little girl.

THE COURT: What's Mary Jo's last name?

THE WITNESS: Harrell, H-a-r-r-e-l-l.

THE COURT: All right. Go ahead, ma'am.

A (Continued) And so, you know, I just wanted to come to hear the verdict today.

Q Well, you came forward to talk to me because -- today?

A Yes, sir.

Q And you gave me some reason, a reason why you did.

Would you please tell the Court what you told me about why you came to talk to me.

A Yes, sir. I was driving and Sherry and Mary Jo was sitting in the front seat with me.

Q When?

A Today, this morning on the way to Court.

And Sherry says, Well, who all testified yesterday. And they said Jackie Lee Bennett did.

Q Do you know Jackie Lee?

A See, I used to live on Stokes Landing Road, and I know him when I see him, but he wouldn't know me.

Q Okay.

A I just know he wears his hat backwards and he has bushy hair.

And anyway, so I said, Well, I thought they said he wasn't going to testify. Because that's what I had heard.

And they said, Well, he did anyhow. And I says --

and Sherry says, Well, what happened. And Mary just says, Well, Jackie just said that he was up around Messer's that night, but he never seen Jody, but he saw three other people.

And I says, I said, Well, there were three other people over there. You know, just casual, and Mary just says, What.

And I says, Well, that night we had went to the river to the fountain after church. We was in revival. And sometimes we come down to the river where the fountain and all at night after church.

And we went down there and was playing football on the grass right there. Well, I wasn't, the kids were. I was watching.

And Tina and Marvin had told me to have their sons home early. It was Mary, Russell, and Lou, and me, and Casey, and Linda, and my little four-year-old girl Micky.

THE COURT: Slow down, ma'am, you're going a little too fast.

Q What time were you supposed to have them home?

A Well, they told me to have them home early. So I told them I would try to have them home before 12:30.

Okay. So we was there and that big clock was there, and Baer had left earlier to go and get him some Skoal. And he come back.

So then we was out there and we was playing, and

that big clock gonged.

I said, What time is it. And about the same time I said what time is it the thing gonged on the, I think it's the Presbyterian Church. I don't know.

Q What time did it gong?

A At 12:00. Okay. So we played around. I says, We've gotta go, we've gotta go, we've got to go.

But if you try to get a bunch of teenagers and one little girl in the -- to go, you know, it took us about five or ten minutes.

So finally we got all in the car. We was parked up there where this here high-rise thing is for the elderly.

And I backed out and we come down St. Johns Avenue, and then we stopped there, right here by the courthouse, here on St. Johns, because Russell wanted to get some money from him.

So we went on up and I turned up the red light.

Q Where is this red light?

A At the Dairy Queen. It's on Highway 20. It's at the Dairy Queen red light. The Dairy Queen red light.

Q Okay.

A All right. I turned around and went around Crill Avenue on 20. Baer went straight. And I don't know, I don't know if anything about where he went after that. He just went straight.

And I went down this way.

Okay. When I got to the corner of 20 and 19 I stopped because the light was red and there was a car coming from this way. And it passed me.

The kids was in the back. They was Russell, Linda, Casey was in the back, and Micky my little girl, she's four, she was sitting in the bucket seat next to me.

And I was sitting there at the red light waiting for the light to change.

And then I was just looking around, the radio was going, and the kids, you know, I was trying to get my mind off the radio because I can't stand that music.

And I looked down towards Flagship Bank. I was looking towards that way.

Q You would be looking to your right up 19?

A Yes, sir.

Q All right.

A And they was someone walking up that way.

Q Walking which-a-way, towards 20 or away?

A Well, towards -- they was on the K-mart side, on this side of the road, and they was walking up towards that way.

Q Towards K-mart?

A Towards K-mart, towards St. Johns Avenue.

Q How many people?

A They was just one.

Q Can you describe that person?

A All I know, it was -- I thought it was a young -- I said, Well, you know, what is that kid doing out this time of night.

Because it was just -- it was just a lanky skinny kid to me, you know, and he was -- whoever it was, was almost up to the Flagship Bank, you know, but not on that side, it was on this side.

Q On the right side of the road?

A He was between Flagship and the red light.

Q Could you recognize that person if you saw him again?

A No, sir, not unless it was -- you know, maybe, if he was walking that same night the same way, you know, same conditions.

Q Well, could you tell whether that person was white or black?

A It was a white boy. I had time to really -- because, you know, the red light, it was red.

Q Could you tell how that particular person was dressed?

A All I know is he had on dark pants.

Q Okay.

A I don't know if they were purple. You know, I

know they wasn't yellow, I don't if they was dark purple or navy blue or black or what.

Q So what did you do next after you stopped there at the red light and looked to your right?

A We turned to the left.

Q Going south on 19?

A Yes, sir, going back up towards Moody Road.

And just as I was, approached the curve, somebody ran across the road over there by Messer's.

Okay. When I got to it I slowed down, and I looked.

Well, you know, I was slowing down because I live on Moody Road. I wasn't slowing down for no particular reason.

Q All right.

A And I looked.

Q Moody Road is close to that point?

A Yeah, see that --

THE COURT: Moody Road intersects, right?

THE WITNESS: Yeah.

MR. PEARL: Yes, sir.

THE WITNESS: Yeah, right here, and other ones here.

Q And what happened.

A And I had to slow down to turn.

Okay. And I looked that way, and there were three --

Q Looked what way, please, ma'am?

A Towards my left.

Q Okay. And what street were you looking down?

A I think it's Third Avenue. I used to live down there. I think it's Third Avenue. I used to live beside Miss Smith.

Q You did?

A The other Miss Smith. Mr. Smith --

Q Mr. Smith?

A I rented from him before, and I lived down there in one of those little trailers.

Q So you know Third Avenue?

A Yes, sir.

Q Okay. Was it Third Avenue you were looking down?

A Yes, sir.

Q Okay. And what if anything did you see?

A Well, they were three people down there in the shadow of that big oak tree. And I could tell it was three because of the streetlights, those streetlights that are there. Whenever you get to -- you know, you can see almost all the way down to a certain point where the streetlights were at.

Q Did you know those three people?

A No, sir.

Q Were they man or woman, could you tell?

A I don't know if they were yellow, purple, green, pink, or what. I couldn't tell you if they were man or if they were women, or what. I just know they was three people.

And I says, Well, I see we're not the only people out this time at night, you know.

Q Could you see what those three people were doing, if anything?

A They was just standing in the middle of the road.

Q I see.

A But I didn't see nobody else. They was nobody else at Messer's.

Q Tell me, do you know Jody Wright?

A I went to school with two of his sisters, and I'm acquainted with Diane.

Q How well do you know Jody?

A He probably don't even know who I am, or if he does know who I am he probably knows me as Mary Jo and Wanda's sister, because we all sort of favor each other.

Q Now, ma'am, are you sure, for example, I have never seen you before today?

A No, sir.

Q Have I ever spoken to you on the telephone before

today?

A No, sir.

Q Have you ever called me or called the Public Defender's office?

A No, sir.

Q Did you have any idea whether what you knew or remembered was important to this case?

A No, sir, because around Moody Road you can ask any of the law enforcement, it's nothing unusual to see people around Messer's.

There's some of the weirdest people hang around in that area, because they drink up there all the time.

Every time I go up there there's people up there drinking always. You can go up there about any time during the night and there's people walking up and down Moody Road and there on 19, so it's nothing unusual to me.

Q How about down on Third Avenue standing down the road?

A It's nothing unusual, it happens all the time. There's people always walking around in that area.

I see them, you know, like if I go to the store, like if I go down to Messer's.

Q And, now, can you -- how closely can you fix for us the time of night when you saw the man walking up toward near the Paletka -- the Flagship Bank and you saw these

people on Third Avenue?

A It had to be between a quarter after 12:00 and 12:30. Sometime within that area, because the clock had struck.

And I'm trying to remember how long -- about how long it took me to get the kids in the car, because by the time I rounded up the football and all of them, so it had to be about -- we had to leave here about quarter after, and it couldn't be no more than a fifteen-minute drive from there to there.

Q So your best judgment is around --

A But after I slowed down though to turn in Moody Road my little girl hollered, she said, Mama, Russell, Russell.

So I didn't turn into Moody Road, because I forgot about Russell being in there. And I went on down to our church.

Q Your church is further down 19?

A Yes, sir. It's Pentecostal Revival Center.

Q I see. And did you go to the church?

A Yes, sir, because Russell had left his car there and he had to pick up his car.

Q Who is Russell?

A It's -- y'all probably know Sister Dolly. It's Sister Dolly Glenn's son.

Q I see.

A He was with us.

Q I see. Did you then get him at the church?

A I dropped him off at the church.

Q Oh, you dropped him off. And then what did you do?

A I went home.

Q You turned around back on 19 and went to Moody Road?

A Yeah, I went to Moody Road and went home. I didn't see nothing though.

Q Okay. Where do you live on Moody Road?

A On Pilot Way. It's a new subdivision there on the right.

Q Okay. Well, for instance, if you were going from 20 and 19, the intersection of 20 and 19, and you went down Moody Road to go home there, would you turn left or right?

A To my house?

Q Yes.

A If I was coming from the intersection I would turn left.

MR. PEARL: Thank you.

You may inquire, sir.

CROSS-EXAMINATION

BY MR. DUNNING:

Q Okay. First, Miss Waters, you've indicated there was nothing unusual about seeing people on Third Avenue?

A No.

Q Was there anything unusual about seeing someone walking down Highway 19?

A No, sir.

Q Then can you tell us how it is you even remember, if it wasn't out of the ordinary?

A Because the next night at church Sister Terry Tyer, it's a girl, she was in Miss Smith's class at school, and she says -- she says, Sister Kathy, she says, doesn't Danny have Miss Smith as a teacher.

I says, Well, he did, I said, but he got transferred out.

And she says, Well, someone killed her last night.

I says, What.

And she says, Yeah.

I says, Oh, no. I said, I says, We was -- I says, We was right there. I says, Last night, because we went to the fountain last night.

She says, Well, did you see anything.

I says, Well, nothing unusual, I said, just a

bunch of kids.

You know, and to me that's not unusual, not for that area.

Q All right. In the area that you saw the kids on Third Avenue, would that have been near her house?

A Well, there's a big oak tree, and, see, somebody dug trenches on 19. They dug holes out there. And it's sort of a clearing up to a bunch of oak trees, and there's a big old oak tree right there by a fence.

I don't know who lives in that house up there. I know Mr. and Mrs Wright live here, and there's a big -- there's a big house here, and there's a trailer -- oh, wait a minute, a field over here.

There's a big oak tree there and a bunch of little scrub oaks and palmettos and stuff.

And it was right after you pass where they dug up the thing there, there was a shadow from that oak tree. They were under the oaks.

Q Let me ask the question in a different way.

How close were the people to Lima Paige Smith's house?

A I don't know how far that is off the road. I'm not no good at judging distance.

THE COURT: Were the people between the intersection and the Wright house?

A Yes, sir.

BY MR. DUNNING:

Q Okay. Now, if I understand you correctly, you have the -- the only testimony at the trial that you have personally heard was part of the testimony of Taylor Douglas this morning?

A I think it was the last question.

Q And then part of the testimony of Clayton Hughes, or all of it?

A All of it.

Q Okay. But you have talked with your sister Wanda and Mary Jo?

A Yes, sir, and Sherry.

Q And Sherry. And they have related or told you about testimony that has previously been given in this trial?

A Well, the only thing they've told me I read in the newspaper, because I read the newspaper every day.

Q All right. Had they told you about the testimony that's been presented during the course of the trial?

A I don't -- they've -- they've only told me what I've read in the newspaper. Now, they've told me --

THE COURT: Ma'am, just answer the question. That calls for a yes or no.

A Yes, I guess.

Q And did you not say that they told you about the testimony of one Jackie Lee Bennett?

A Yes, sir, this morning.

Q Exactly what did they tell you Jackie Lee Bennett said?

A They told me -- okay. We was coming, and I wasn't -- and we was just riding, and Mary Jo and Sherry -- and Mary Jo was sitting over there, and Sherry asked who testified yesterday, because, see, she didn't know -- I told her this morning, I --

THE COURT: Ma'am, just get to the bottom line, if we can.

THE WITNESS: Well, this is sort of to the bottom line.

Q I'm just asking you what she said about his testimony.

A She just said that Jackie Bennett said that he was off and on up at Messer's store that night, and that he didn't see Jody, and that the only people he saw was three people.

And I said, Well, that's right, they was.

But I didn't think nothing of it. I mean, I came here to hear the verdict, because that's what they told

me was going to happen today.

Q And did they tell you anything about the testimony of Jody Wright?

A No, sir.

Q What he said?

A Well, the only thing they told me about the testimony of Jody Wright, that he didn't -- that they didn't feel like he had a very good chance to say anything.

Q Okay. Did they indicate to you anything about what he in fact did say?

A The only things they said that he said was that Charles was lying.

Q They didn't indicate to you any testimony he gave about where he was that night?

A No, sir. And about that Walter Perkins -- I don't really -- something about -- something that's supposed to have been said in his thing.

I don't even -- I didn't even -- I really wasn't paying attention to all of what they were saying.

Q Okay. Nothing was said to you about anyone testifying yesterday concerning anyone walking down Highway 19?

A No, sir.

Q Now, I won't go into all the questions of who all was at the revival, which I would have to eventually go into.

Who was in the car with you?

A There was myself and my daughter Micky, she's four, my daughter Casey, she's twelve, and Linda Pierce, is a friend of Casey's, she's fifteen, I think, and Russell, he's -- he was eighteen at the time, he just turned nineteen May 1st.

THE COURT: What's his last name?

THE WITNESS: Garner.

MR. PEARL: Gardner?

THE WITNESS: Garner, G-a-r-n-e-r.

BY MR. DUNNING:

Q And would it be fair to say that each of these people, and let's leave the four-year-old daughter out of it, but so far as the more mature people, Casey, Linda, and Russell, they would all have had the opportunity to see what you say?

A Now, they might have saw the person walking down 19, but it would have been impossible for them to see the three people.

I was in my van, and this side of my van had -- it's panelled, and it had a mural on it.

MR. PEARL: The left side?

THE WITNESS: Yes, sir, on the driver's side.

MR PEARL: I'm sorry, I'm sorry.

THE WITNESS: There's a mural there. Well, there was, but we don't have the van anymore, I sold it.

BY MR. DUNNING:

Q Now --

A Well, can I say, they possibly could have heard me say we're not the only ones out at this time of night, at least we're not the only ones, because if they were paying attention.

Q And I believe you have indicated that you don't have any idea who that person was walking down Highway 19.

A It could have been you for all I know.

Q It could have been some kid?

A It could have been anybody.

Q And you've also said, have you not, that you haven't found it to be particularly unusual for people to be walking down Highway 19?

A No, it's not unusual.

Q Now, you talked about the church and revival. Did Miss Smith attend that church, Miss Lima Paige?

A No, sir.

Q Did any of the Wrights?

A No, sir, not since I've been there they haven't.

Q How long have you been there?

A A little over two-and-a-half years. I quit for a year in there, then I went back.

Q Okay. When's the last time you have either seen and/or spoken with either of the two sisters of this Defendant whom you say you know and went to school with?

A When was the last time?

Q (Nods head.)

A Today.

Q And what was that conversation about?

A My sister had told Diane about what I had seen, and she just told me she wanted me to talk to Mr. Pearl.

But he told me not to discuss it with nobody, and I didn't.

She was standing up there with me when we were talking.

Q And when would have been the next most recent time you would have seen and/or spoken with either of the sisters of Jody Wright?

A It was either -- let's see, today's Thursday --

THE COURT: Wednesday.

A Wednesday. It was Monday.

Q Okay.

A She came to my home and ate dinner.

Q Okay. And did that conversation include anything about the trial of Joel Dale Wright?

A Yes, sir, it did.

Q And what was that conversation concerning?

A Let me think. Oh, about the bottle, the glass bottle.

Q Okay.

A And the little glasses.

Q And you've made reference on numerous occasions to articles that appeared in the newspaper.

A Yes, sir.

Q Am I correct in assuming your referring to the Palatka Daily News?

A Yes, sir.

Q And have you been keeping up with the progress of this trial by what has been written in the Palatka Daily News?

A Yes, sir.

Q Would you say you probably read it every day to find out what happened at the trial?

A Yes, sir.

Q And so you've read, have you not, about what some witnesses have testified to, or perhaps on occasion they've even put in there what they didn't testify to?

A I read what they testified to.

Q Okay. That's a fair enough response.

MR. DUNNING: Judge, I think that's the full

nature of my inquiry. Obviously, subject to the Court's ruling, I would have to further and start getting the names --

THE COURT: I have some questions for Miss Waters.

Who is Baer?

THE WITNESS: That's Russell's next brother. His name is spelled B-a-e-r.

THE COURT: All right, ma'am.

THE WITNESS: It's a family name.

THE COURT: I understand.

You say that he -- you cut off by the -- you came up St. Johns Avenue where, to where the Dairy Queen is?

THE WITNESS: Yes, sir.

THE COURT: Cut off there and went out Highway 20?

THE WITNESS: Yes, sir.

THE COURT: To the intersection of 19?

THE WITNESS: Yes, sir.

THE COURT: You said that Baer went straight ahead?

THE WITNESS: Yes, sir.

THE COURT: How far out did he go, how far out St. Johns did he go?

THE WITNESS: I don't know if turned up Palm, if he turned at 19, or if he went on down to the college.

THE COURT: Where was he going?

THE WITNESS: Home -- well, he was going to go wait for Russell at that Silver Lake Grocery.

THE COURT: All right, ma'am.

THE WITNESS: So they could all go home together.

THE COURT: Have you ever discussed this matter with him?

THE WITNESS: No, sir, because I never even thought -- it never even occurred to me until this morning.

THE COURT: This person you saw on Highway 19, you think he was white?

THE WITNESS: Yes, sir.

THE COURT: Could you tell me what kind of hair he had?

THE WITNESS: Well, it wasn't frizzy.

THE COURT: I understand that. You're talking about an afro.

THE WITNESS: Well, I mean, like my nephews, they've got blond hair but it's frizzy.

THE COURT: I understand. What length was

the person's hair?

THE WITNESS: It wasn't long.

THE COURT: It was not?

THE WITNESS: No, sir.

THE COURT: It would be short?

THE WITNESS: Yes. It wasn't down like over, you know, as far as I could see it wasn't long like you see a lot of them today.

THE COURT: Now, Miss Waters --

THE WITNESS: Yes, sir.

THE COURT: -- you say that somebody ran across from Messer's?

THE WITNESS: Yeah, just one person.

THE COURT: Ran across in front of you, just one person?

THE WITNESS: It wasn't right there at -- see, I was -- you know, after you pass where that M & E Lighting is, and there's that sort of a curve, it's not a real extensive curve, it's just a crook in the road, well it was then.

THE COURT: All right. Someone ran across towards the direction of Messer's?

THE WITNESS: Yes, sir.

THE COURT: Were the lights on at Messer's?

THE WITNESS: No, sir.

THE COURT: Messer's was closed then?

THE WITNESS: Yes, sir, but there's a streetlight there.

THE COURT: There's a streetlight.

THE WITNESS: Yes, sir.

THE COURT: All right. Now, was that person an adult or a child?

THE WITNESS: I would say it was a young person by the way they ran.

THE COURT: Male or female?

THE WITNESS: I don't know. Some girls run like boys. He didn't have long hair, whoever that was.

THE COURT: Okay. Now, did that person run over to the area of the tree that you're describing to me and join other people there; is that what called your attention to these?

THE WITNESS: Possibly so. I know he run. When whoever -- I'm not going to say he or she, because I don't know -- whoever ran, they ran to them.

They were all standing in the middle of the road.

THE COURT: And you didn't see but three people?

THE WITNESS: Yes, sir.

THE COURT: So that would mean that the person who ran across was one of those three people?

THE WITNESS: I assume, unless he jumped in the ditch or went to the tree or kept on going. But I didn't see nobody further down.

THE COURT: Now, these people were merely standing there in the road?

THE WITNESS: Yes, sir.

THE COURT: And that was not an unusual place for people to be?

THE WITNESS: No, sir. If you lived on Moody Road it wouldn't be, or in that area, it wouldn't be.

THE COURT: You didn't see them walking back down Third Avenue towards Miss Smith's house?

THE WITNESS: No, sir. And when I came back I didn't see them over at Messer's either, because I did come back up after I took Russell.

THE COURT: Came back up and made the turn off 19 onto Moody Road?

THE WITNESS: Yes, sir, and I didn't see no one then.

THE COURT: Either at Messer's or on Moody Road or on Third Avenue?

THE WITNESS: Well, I couldn't have seen them if they were down further on Third Avenue then, because Moody Road is up before Third Avenue when you come back the other way.

THE COURT: When you came by, did you see anyone at the area of M & E Lighting?

THE WITNESS: At who? Oh, M & E Lighting?

THE COURT: Yes, ma'am.

THE WITNESS: No, sir.

THE COURT: You didn't see anybody there?

THE WITNESS: No, sir.

THE COURT: Did you see anybody at the convenience store there at the corner?

THE WITNESS: Yes, sir, they was -- there was people there at the convenience store.

THE COURT: Several of them in the parking lot, several cars in the parking lot?

THE WITNESS: No more than usual.

THE COURT: Did you see anybody that you recognized?

THE WITNESS: No, sir.

THE COURT: You say these other people in the vehicle with you could not see out that

side of the van?

THE WITNESS: No, sir. We had -- just a van -- now, on the other side there was windows all the way down.

THE COURT: And you're sure this was between 12:00 and 12:30?

THE WITNESS: Yes, sir, I'm positive of that.

Another reason that I know it was that, the next morning Baer's father got onto me because I kept them out so late.

I said, Now, look, I took Russell to the church between -- see, but he had broke down between there and there, and they didn't get home until 2:00. So that's the reason he fussed at me, that's the reason I can remember.

THE COURT: All right. You say that you know Jody Wright's sisters?

THE WITNESS: Yes, sir.

THE COURT: And they're close enough friends with you that one of them had dinner in your home on Monday?

THE WITNESS: Well, Diane, she's really my sister's friend. But, see, my sisters, Wanda, Mary Jo, Diane, came to the house to eat dinner during recess or something, break or something.

Then my other sister Sherry came from her house over to my house, and she came back to court with them.

THE COURT: Have one of your sisters been in court pretty much the whole trial?

THE WITNESS: Mary Jo and Wanda, I guess together's been here more than anybody. You know, of -- no, Sherry, I don't know how many days her and Keith has come.

MR. DUNNING: That's Keith Rigdon?

THE WITNESS: Yes, sir.

THE COURT: All right. Anything further?

MR. DUNNING: Not for purposes of this hearing.

THE COURT: Anything further, Mr. Pearl, for purposes of this hearing from this witness?

I'll hear arguments.

MR. PEARL: No, sir, nothing further from this witness.

THE COURT: Miss Waters, thank you very much, ma'am.

Since you have been placed under oath and have become sort of a witness in this case, I should tell you that it is not permissible, absolutely not permissible for you to discuss

this case or your testimony with any other person except with Mr. Dunning or Mr. Pearl as the case may be. But you should not discuss this case or your testimony which you have given here this morning with any other person until this case is completely decided and over with.

Any violation of that rule may subject you to a contempt of court charge, and may disqualify you from serving as a witness in this case, should that become appropriate.

All right, ma'am. If you would be kind enough to step back into the hallway, ma'am. We'll be in touch with you if we need you. Remember what I said.

THE WITNESS: Just sit in the hallway, right?

THE COURT: Yes, ma'am, that will be fine.

Do not discuss this case or your testimony or what went on in this room with anybody.

MR. PEARL: So you won't talk to Diane or anybody.

THE WITNESS: I won't even sit with them, I'll stay away from them.

THE COURT: That's the best idea you've had all day, lady.

(The witness withdrew from the hearing room.)

to properly prepare for trial. The trial being over, it's hard to continue -- for all practical purposes, over so far as the taking of testimony is concerned. It's a little late now to start preparing for more.

THE COURT: Well --

MR. PEARL: Your Honor, I would like to make a brief reply.

THE COURT: I understand. Go ahead.

MR. DUNNING: Am I permitted --

MR. PEARL: Oh, are you not finished?

MR. DUNNING: No, I was just trying to go through the Richardson criteria.'

We would suggest to the Court that --

(Freddie Williams entered the hearing room.)

MR. WILLIAMS: Excuse me. The witness said she remembered something else she would like to bring to your attention.

THE COURT: Then ask the lady to step back in.

Hold what you got, Mr. Dunning.

MR. DUNNING: Yes, sir.

THE COURT: Miss Waters, please come in and have a seat.

You've told Mr. Williams now that you remember

something else that you think we should know?

THE WITNESS: Yes, sir. You've got to understand, this is something I've never been through before, and it's sort of upnerved me.

But you said while ago, or someone did, I don't even remember, who said, said did anybody else say anything to me about anybody else on the road.

And I remember now, after I said what they was three people to my sister, and I says, and there was another guy going towards K-mart.

My sister said, Well, that could have been Jody. I says, No. I says because Jody would have went down Third Avenue and up that other road and down Carole Road to go where Charles lives at. Because someone told me that he lived in that Kennedy Trailer Park that's over there.

THE COURT: Kelly, I think is the name of it.

THE WITNESS: I don't know. I thought it was Kennedy. And I thought I should tell you that, because I don't want to do nothing that I'm not supposed to do.

THE COURT: All right. Thank you very much. Please remember my instructions. Is that all you

want to tell us, Miss Waters?

THE WITNESS: Yes, sir. But I didn't want y'all -- I didn't want to forget.

MR. DUNNING: May I?

THE COURT: Yes, sir. Wait just one moment.

MR. DUNNING: When did Mary Jo say that could have been Jody, when did she tell you that?

THE WITNESS: Whenever we was on the way to court in the car.

MR. DUNNING: This morning?

THE WITNESS: Yes, sir. I didn't want -- I didn't want --

MR. DUNNING: Did she tell you why she thought that might have been Jody?

THE WITNESS: No, sir.

MR. DUNNING: Or why she had any reason to believe that would have been Jody?

THE WITNESS: No, sir.

MR. DUNNING: Nothing further.

THE COURT: Mr. Pearl.

THE WITNESS: Or if she did I don't -- because this is nervous, y'all don't know how nervous I am.

MR. PEARL: Well, I want to get something straight now.

Do you have any other knowledge, or do you

have anything else to tell the Court along the lines that you think it was Jody or you believe it was, or do you have anything more that would tell you who it was?

THE WITNESS: No, sir.

MR. PEARL: Is it still your testimony that you don't know who it was?

THE WITNESS: No, sir. If I had known -- if it would have been, and I'd known it, I would have picked him up and took him to where he wanted to go, because I do know him.

MR. PEARL: But you say he doesn't know you.

THE WITNESS: I don't think so, unless it's -- like I say, unless it's because of Mary Jo and Wanda and Sherry, because if you look we all do have a family resemblance on our daddy's side. That's all.

MR. PEARL: Thank you, ma'am.

THE COURT: Miss Waters, one other thing. Did you talk with Mr. Wright's sisters last week?

THE WITNESS: No, sir, I didn't see none of them last week.

THE COURT: Did you talk to them the week before?

THE WITNESS: No, sir. The last time I saw

Diane was right after they come back from a -- I think they was living in North Carolina or South Carolina, and I saw her up at -- she was getting a sandwich at the Bookworm. It's closed now, but I was up at that little laundromat there beside Jerry's. I was drying clothes, me and my niece.

THE COURT: How long ago was that?

THE WITNESS: That's easy to remember, because Mary Alice was here. It was in June, the first week of June.

THE COURT: Of this year?

THE WITNESS: Yes, sir.

THE COURT: Did you discuss -- have you discussed with anyone this trial and what was going on?

THE WITNESS: Yes, sir. I won't lie to you, I have.

THE COURT: Who all have you talked to about it?

THE WITNESS: A lot of people. A lot of people are talking about the trial.

THE COURT: Has anyone mentioned to you --

THE WITNESS: We even had prayer about it at church last night.

THE COURT: Has anyone mentioned to you anything, any other testimony that has taken place in the trial?

THE WITNESS: The only thing I can really remember is about the bottle and about the ring finger. You know, that, and about her underclothes. I remember that.

THE COURT: All right, ma'am. Has anybody mentioned to you what Jody's defense might be?

THE WITNESS: You mean that --

THE COURT: Has anybody mentioned to you how he was defending himself, what he was saying or what his defense would be?

THE WITNESS: Just that he didn't do it, and that he went to -- that he went to Charles' house. But then somebody else told me it wasn't even Charles' house, it was his brother's.

THE COURT: But somebody did tell you that Jody went to Charles' house?

THE WITNESS: Yes.

THE COURT: That night.

THE WITNESS: Yes.

THE COURT: And stayed there.

THE WITNESS: Yes, sir.

THE COURT: All night.

THE WITNESS: Yes, sir.

THE COURT: Who told you that?

THE WITNESS: It could have possibly been one of my sisters.

THE COURT: Do you know who told them that?

THE WITNESS: No, sir, you would have to ask them.

THE COURT: When did they tell you that?

THE WITNESS: All along, ever since Jody was arrested.

THE COURT: Inquiry, Mr. State Attorney?

MR. DUNNING: They've been telling you this all along that he went to Charles' house, did they tell you how he went to Charles' house?

THE WITNESS: No, sir.

MR. DUNNING: Did they tell you what time in the nighttime that he went to Charles' house?

THE WITNESS: No, sir. The only thing they told me that Charles had said that he went, and I guess it's hearsay then, that Charles said he come to his house and told him that he had just -- you know, that's what they said, you know.

MR. DUNNING: I'm sorry, you're jumping around so much only I can't figure --

THE WITNESS: Okay. They said -- they told

me that Jody went -- that -- Paige worked with my mother out there at the mill, Charles' wife.

MR. DUNNING: Okay.

THE WITNESS: All right. She went to the thing. Okay. They said that Charles said Jody came to his house, and that he told Charles that he had just killed Miss Smith.

MR. DUNNING: Okay.

THE WITNESS: And -- and that's all -- you know, that's the only reason I know that they said he went to Charles' house. But that's been in the paper.

MR. DUNNING: But you don't know whether he's supposed to have gone to Charles' house at nighttime or in the morning?

THE WITNESS: No, sir. I assume it was -- I assume it was late that night.

MR. DUNNING: Okay. And you've known that for some time, that that -- that sometime late that night --

THE WITNESS: Well, it's been in the paper.

MR. DUNNING: Well, even before then you said that your sisters had talked to you and had been telling you, I think you said, all along since his arrest.

THE WITNESS: Well, not -- well, since it hit the papers. Because, see, we had been in St. Augustine, and we stopped at my sister's house in East Palatka. And she had the paper where it said that he had been arrested for her --

MR. DUNNING: Okay.

THE WITNESS: -- murder. And we read it in the papers, and that's the first time I heard anything about it.

MR. DUNNING: Okay. You have told the Judge, have you not, that you had heard all along since Jody was arrested that Jody went over to Charles' house?

THE WITNESS: Well, not every day, but, you know, it's come up.

MR. DUNNING: Okay. So you knew that before the trial?

THE WITNESS: Well, it was in the paper.

MR. DUNNING: You knew that before the trial?

THE WITNESS: Yes, sir, yes, sir, I did. Yes, sir, I did.

MR. DUNNING: Okay. But you never attached any significance to a person walking north on Highway 19; and is that not a way of going to Kelly's Trailer Park, a possible way of getting

there, walking up 19?

THE WITNESS: No, sir. That boy would be way down too far.

Isn't Kelly's Trailer Park -- It's Kennedy's Trailer Park, it's between Crill and Silver Lake.

MR. DUNNING: No, ma'am. I think you're thinking about the wrong trailer park.

THE WITNESS: See, that's the trailer park.

MR. DUNNING: May I suggest, without -- maybe it's being unduly suggestive, but may I suggest to you: Do you know where the Army Reserve is over there off St. Johns Avenue?

THE WITNESS: Yes, sir.

MR. DUNNING: Do you know about that trailer park right beside it?

THE WITNESS: That was -- yes, sir. It was in the paper that that was the Army Reserve.

MR. DUNNING: That's Kelly's Trailer Park.

THE WITNESS: Well, where is -- that's Kennedy's Trailer Park on Palm. That's where I thought that Charles Westberry lived, was Kennedy's Trailer Park. Or I guess it's Kennedy's, it's Canady.

MR. DUNNING: Ma'am.

THE WITNESS: I know what you're trying to

say, and I'm all confused.

MR. DUNNING: I understand. You did already know about supposedly he went someplace by the Army Reserve?

THE WITNESS: I think it was in last night's paper.

MR. DUNNING: But that's the first you heard about it?

THE WITNESS: Yes, sir. See, all this time I thought that it was on Palm Avenue, that trailer park there between Doctor Sammy's old office and Carole Road. That narrows it down further.

MR. DUNNING: Never mind.

Nothing further.

MR. PEARL: Miss Waters, I think everybody would like to know what your response would be to a question like this: Did you make any plan with any member of your family or Jody Wright's family before today that you would hold back what you knew and then come in here at the last minute and tell us about it?

THE WITNESS: No, sir, because it really didn't mean nothing to me. Because like I say, it's nothing unusual to me.

MR. PEARL: So as far as you know then, no

member of the Wright family, and certainly not myself, have ever met you, have ever talked to you about what you testified to today?

THE WITNESS: No, sir, and nobody -- ain't nobody knew it until this morning. Then we got to the courthouse.

MR. PEARL: Thank you, ma'am.

THE WITNESS: Okay. I'm sorry --

THE COURT: Miss Waters, please remember my instructions, ma'am.

THE WITNESS: I'm sorry about that other.

THE COURT: It's all right, ma'am. Please remember my instructions.

MR. DUNNING: Your Honor, the only final argument, what she's just said does nothing more than add to argument I already presented, which needs no rehashing.

The only other matter is, being a witness she would have been under the sequestration rule, and it has been stated in the case of Ali, A-l-i, versus State, found at 352, So.2d, 546. It's a decision of the Third District Court of Appeal in 1977.

And quoting from the last paragraph of page 547 on into the upper part of the page at 548:

THE COURT: Madam Reporter, we're back on the record in chambers out of the presence of the jury with regard to the motion by the Defense in this cause to re-open its case.

I have heard the testimony of the witness, I have heard the arguments of Counsel, and I have considred the authorities which have been brought to me, and I have come to the conclusion that to allow this testimony at this stage in these proceedings would be severely prejudicial to the State; that, too, after the evidence is closed in the cases in chief, after all of the rebuttal evidence except for three questions which do not bear on the point at issue here have been asked, to allow a witness to come forward who claims to have testimony tending to support one side or the other to the prejudice of the other side in such fashion as it has been presented here to me today is not appropriate, and I'm going to deny the Defendant's motion to re-open its case based on the testimony of Mrs. Waters as given here today.

In making this ruling I do not attribute to the Defense any, any type of bad motive or bad faith, as I did not attribute to the State when a previous matter was brought to our attention; did

not attribute any bad motive or bad faith.

I think that Counsel has acted with the greatest of professionalism in this case. But if we allow people to come out of the woodwork, as it were, and to testify in support of one side or the other, almost as if that testimony were tailor-made and after that witness had had the opportunity to know and discuss and confer at great length with numerous people concerning the facts in the case and concerning the testimony of people in the case, if the rules governing disclosure, if the rules of sequestration are to mean anything, then there must be an end to it, and I'm going to deny the motion on that basis.

If it is error, so be it. It is not done in any type of bad faith by anyone connected with these proceedings, but, gentlemen, we're going to proceed with the charge conference and closing arguments in this case.

Now, that's all we need the Reporter for.

Madam Reporter, we can go off the record.

(Court recessed at approximately 12:30 p.m., to be reconvened at 2:00 p.m. of the same day.)

* * *

A 6

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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A 6

App. "C"

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 37, ch. 19654, 1939; CGL 1940 Supp. 9863.26(6); s. 119, ch. 70-339, s. 1, ch. 72-72, s. 9, ch. 72-724, s. 1, ch. 74-379, s. 348, ch. 77-104, s. 1, ch. 77-174, s. 1, ch. 78-363, s. 177, ch. 83-216.
Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record, or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 79-276.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 3900a, ch. 19504, 1939; CGL 8438, 8477; CGL 1940 Supp. 8863.27(6); s. 133, ch. 79-326.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.

History.—s. 381, ch. 19654, 1939; CGL 1940 Supp. 8863.27(1); s. 134, ch. 70-339, s. 1, ch. 70-210, s. 34, ch. 79-3, s. 12, ch. 79-62, s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-437; ss. 19, 36, ch. 69-106; s. 133, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 72-71; s. 14, ch. 77-120; s. 36, ch. 79-3.

A 70

388 US 14

JACKIE WASHINGTON, Petitioner,

v

TEXAS

388 US 14, 18 L ed 2d 1019, 87 S Ct 1920

[No. 619]

Argued March 15 and 16, 1967. Decided June 12, 1967.

SUMMARY

Following a jury trial in a Texas state court, the defendant was convicted of murder and sentenced to 50 years in prison. At the trial, the defendant contended that another person, who had already been convicted and sentenced for the same murder, had been the one who shot the victim, and that the defendant had attempted to prevent the shooting. The defendant claimed that the other person would testify to these facts, and he offered the other person's testimony, but the prosecution successfully objected to the other person's being permitted to testify, on the basis of statutory provisions that persons charged as principals, accomplices, or accessories in the same crime could not testify in behalf of one another. Rejecting the defendant's contention that the refusal to permit the other person to testify deprived the defendant of his constitutional right to have compulsory process for obtaining witnesses in his favor, the Texas Court of Criminal Appeals affirmed the conviction. (400 SW2d 756.)

On certiorari, the United States Supreme Court reversed. In an opinion by WARREN, Ch. J., expressing the views of eight members of the court, it was held that an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was so fundamental that it could be considered incorporated in the due process clause of the Fourteenth Amendment, and that the defendant was denied such right in the instant case.

HARLAN, J., concurring in the result, expressed the view that due process was violated in the instant case, but that the decision should not be based upon the compulsory process clause of the Sixth Amendment.

SUBJECT OF ANNOTATION

Beginning on page 1388, infra

What provisions of the Federal Constitution's Bill of Rights are applicable to the states

A 71

App. "H"

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Constitutional Law § 37; Witnesses § 4 — accused's right to compulsory process — applicability in state trials

1. The right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the due process clause of the Fourteenth Amendment, so as to be applicable in state trials.

[See annotation p 1388, infra]

Witnesses § 12 — testimony by associate in crime

2. A defendant in a state criminal trial is denied his constitutional right to have compulsory process for obtaining witnesses in his favor, where the state, by preventing persons charged as principals, accomplices, or accessories in the same crime from testifying in behalf of one another, while permitting such persons to testify in behalf of the prosecution, has arbitrarily denied the defendant an opportunity to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

APPEARANCES OF COUNSEL

Charles W. Tessmer argued the cause for petitioner.
Howard M. Fender argued the cause for respondent.
Briefs of Counsel, p 1641, infra.

OPINION OF THE COURT

Mr. Chief Justice **Warren** delivered the opinion of the Court.

We granted certiorari in this case to determine whether the right of a

TOTAL CLIENT SERVICE LIBRARY REFERENCES

AM JUR, Witnesses (1st ed §§ 12, 156)
21 AM JUR PL & PR FORMS, Witnesses, Forms 21:683, 21:689
US DIGEST ANNO, Witnesses §§ 4, 12
ALR DIGESTS, Witnesses §§ 3, 13
L ED INDEX TO ANNO, Witnesses
ALR QUICK INDEX, Witnesses

ANNOTATION REFERENCES

Right of persons jointly indicted to be witnesses for each other. 13 L ed 1023; 36 L ed 991.

Uniform act to secure attendance of witnesses from without a state in criminal proceedings. 44 ALR2d 732.

Accused's right to interview witness held in public custody. 14 ALR3d 652.

defendant in a criminal case under
*[388 US 15]
the *Sixth Amendment[1] to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment,[2] and whether that right was violated[3] by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other.

Petitioner, Jackie Washington, was convicted in Dallas County, Texas, of murder with malice and was sentenced by a jury to 50 years in prison. The prosecution's evidence showed that petitioner, an 18-year-old youth, had dated a girl named Jean Carter until her mother had forbidden her to see him. The girl thereafter began dating another boy, the deceased. Evidently motivated by jealousy, petitioner, with several other boys began driving around the City of Dallas on the night of August 29, 1964, looking for a gun. The search eventually led to one Charles Fuller, who joined the group with his shotgun. After obtaining some shells from another source, the group of boys proceeded to Jean Carter's home, where Jean, her family and the deceased were having supper. Some of the boys threw bricks at the house and then ran back to the car, leaving petitioner and Fuller alone in front of the house with the shotgun. At the sound of the bricks the deceased and Jean Carter's mother rushed out on the porch to investigate. The shot-
*[388 US 16]
gun was fired by either petitioner or Fuller, and the *deceased was fatally wounded. Shortly afterward petitioner and Fuller came running back to the car where the other boys waited, with Fuller carrying the shotgun.

Petitioner testified in his own behalf. He claimed that Fuller, who was intoxicated, had taken the gun from him, and that he had unsuccessfully tried to persuade Fuller to leave before the shooting. Fuller had insisted that he was going to shoot someone, and petitioner had run back to the automobile. He saw the girl's mother come out of the door as he began running, and he subsequently heard the shot. At the time, he had thought that Fuller had shot the woman. In support of his version of the facts, petitioner offered the testimony of Fuller. The record indicates that Fuller would have testified that petitioner pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot.

It is undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense. Fuller was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting. Fuller, however, had been previously convicted of the same murder and sentenced to 50 years in prison,[3] and he was confined in the Dallas County jail. Two Texas statutes provided at the time

1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

2. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

3. See Fuller v State, 397 SW2d 434 (Tex Crim App 1966).

compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 US 257, 92 L ed 682, 68 S Ct 499 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 US, at 273, 92 L ed at 694 (footnote omitted).

*[388 US 19]

*The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

II.

Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case. The testimony of Charles Fuller was denied to the defense not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not. We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court. The resolution of this question requires some discussion of the common-law context in which the Sixth Amendment was adopted.

Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense

*[388 US 20]

at all.[12] Although "the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787,"[13] the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Despite the abolition of the rule generally disqualifying defense witnesses, the common law retained a number of restrictions on witnesses who were physically and mentally capable of testifying. To the extent that they were applicable, they had the same effect of suppressing the truth that the general proscription had had. Defendants and codefendants were among the large class of witnesses disqualified from testifying on the ground of interest.[14] A party to a civil or criminal case was not allowed to testify on his own behalf for fear that he might be tempted to lie. Although originally the disqualification of a codefendant appears to have been based only on his status as a party to the action, and in some jurisdictions co-indictees were allowed to testify for or against each other if granted separate trials,[15] other jurisdictions came to the view that accomplices or co-indictees were incompetent to testify at least in favor of each other even at separate trials, and in spite of statutes making a defendant competent to testify in his own behalf.[16]

*[388 US 21]

*It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, "each would try to swear the other out of the charge."[17] This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.[18]

The federal courts followed the common-law restrictions for a time, despite the Sixth Amendment. In United States v Reid, 12 How 361, 13 L ed 1023 (1852), the question was whether one of two defendants jointly indicted for murder on the high seas could call the other as a witness. Although this Court expressly recognized that the Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly including the refusal to allow the defendant in a serious criminal case to present witnesses in his defense,[19] it held that the rules of evidence in the federal courts were those in force in the various States at the time of the passage of the Judiciary Act of 1789, including the disqualification of defendants indicted together. The holding in United States v Reid was not satisfactory to later generations, however, and in 1918 this Court ex-

*[388 US 22]

pressly overruled it, *refusing to be bound by "the dead hand of the common-law rule of 1789," and taking note of "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ."

12. 3 Story, Commentaries on the Constitution of the United States §§ 1786-1788 (1st ed 1833).

13. By 1701 the accused in both treason and felony cases was allowed to produce witnesses who could testify under oath. See 2 Wigmore, Evidence § 575, at 685-686 (3d ed 1940).

14. See generally 2 Wigmore §§ 575-576 (3d ed 1940). We have discussed elsewhere the gradual demise of the common-law rule prohibiting defendants from testifying in their own behalf. See Ferguson v Georgia, 365 US 570, 5 L ed 2d 783, 81 S Ct 756 (1961).

15. See 2 Wigmore § 580, at 709-710 (3d ed 1940); Henderson v State, 70 Ala 23, 24-25 (Dec Term 1881); Allen v State, 10 Ohio St 287, 303 (Dec Term 1859).

16. See Foster v State, 45 Ark 328 (May Term 1885); State v Drake, 11 Ore 396, 4 Pac 1204 (1884). Both cases have been overturned by statute. Ark Stat Ann § 43-2017 (1947); Ore Rev Stat § 139-315 (1965).

17. Benson v United States, 146 US 325, 335, 36 L ed 991, 995, 13 S Ct 60 (1892).

18. "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." Benson v United States, 146 US 325, 336, 36 L ed 991, 996, 13 S Ct 60 (1892).

19. 12 How, at 363-364, 13 L ed at 1024, 1025.

Rosen v United States, 245 US 467, 471, 62 L ed 406, 409, 38 S Ct 148.

Although Rosen v United States rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment. In light of the common-law history, and in view of the recognition in the Reid case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.

The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant.[20] Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecu-

*[388 US 23]

tion *for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie.

[2] We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.[21] The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed.

It is so ordered.

20. See n 5, supra.

21. Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

SEPARATE OPINION

Mr. Justice **Harlan**, concurring in the result.

For reasons that I have stated in my concurring opinion in Gideon v Wainright, 372 US 335, 349, 9 L ed 2d 799, 808, 83 S Ct 792, 93 ALR2d 733, and in my opinion concurring in the result in Pointer v Texas, 380 US 400, 408, 13 L ed 2d 923, 928, 85 S Ct 1065, and in my dissenting

*[388 US 24]

*opinion in Poe v Ullman, 367 US 497, 539-545, 6 L ed 2d 989, 1016-1020, 81 S Ct 1752, I cannot accept the view that the Due Process Clause of the Fourteenth Amendment "incorporates," in its terms, the specific provisions of the Bill of Rights. In my view the Due Process Clause is not reducible to "a series of isolated points," but is rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." Poe v Ullman, supra, 367 US at 543, 6 L ed 2d at 1019; see Palko v Connecticut, 302 US 319, 82 L ed 288, 58 S Ct 149; Klopfer v North Carolina, 386 US 213, 226, 18 L ed 2d 1, 10, 87 S Ct 988 (opinion concurring in the result).

I concur in the result in this case because I believe that the State may not constitutionally forbid the petitioner, a criminal defendant, from introducing on his own behalf the important testimony of one indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution. Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none.

In my opinion this is not, then, really a problem of "compulsory process" at all, although the Court's incorporationist approach leads it to strain this constitutional provision to reach these peculiar statutes. Neither is it a situation in which the State has determined, as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons, as for example, the mentally incompetent[1] or those previously convicted of perjury,[2] that the pursuit of truth is best served by an across-the-

*[388 US 25]

board disqualification *as witnesses of persons of that class. Compare Spencer v Texas, 385 US 554, 17 L ed 2d 606, 87 S Ct 648. This is rather a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.

On this premise I concur in the reversal of the judgment of conviction.

1. E. g., Cal Civ Proc Code § 1880, subd 1; Cal Pen Code § 1321.

2. E. g., Vermont Stat Ann, Tit 12, § 1608. See generally 2 Wigmore, Evidence § 488 (3d ed 1940).

EDITOR'S NOTE

An annotation on "What provisions of the Federal Constitution's Bill of Rights are applicable to the states," appears p 1388, infra.

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ORIGINAL

NO. 85-5747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOEL DALE WRIGHT
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Supreme Court's opinion in this case.

QUESTIONS PRESENTED

A. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT EXCLUSION OF THE TESTIMONY OF A DEFENSE WITNESS WHO HAD VIOLATED THE RULE OF SEQUESTRATION WAS HARMLESS ERROR WHEN THIS QUESTION IS SO EXPLICITLY FORECLOSED BY PRIOR DECISIONS OF THIS COURT AS TO LEAVE NO ROOM FOR REAL CONTROVERSY, THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY, AND THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

B. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES AS QUESTIONS OF FACT MAY BE FOUND BY THE TRIAL JUDGE RATHER THAN BY THE JURY WHEN THIS QUESTION HAS BEEN DISPOSED OF BY THIS COURT ON NUMEROUS OCCASIONS.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties.

INDEX

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The respondent rejects the petitioner's statement of the case and facts as slanted and as too narrow to afford this Court the complete overview of the proceedings below necessary to its determination of whether it should exercise certiorari jurisdiction in this cause. A more detailed history is set forth in the opinion of the Florida Supreme Court in Wright v. State, 10 F.L.W. 364 (Fla. 1985), set out herein for the convenience of the Court. Further references will be drawn from the proffer of excluded testimony included in petitioner's appendix as Appendix F.

The petitioner, Joel Dale Wright, was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. In accordance with the jury's sentence recommendation, the trial judge imposed the death sentence for the first-degree murder. The petitioner also received sentences of 99 years for sexual battery, 15 years for burglary, and 5 years for grand theft.

The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, petitioner came to Westberry's trailer and confessed to him that he had killed the victim; that petitioner told him he entered the victim's house through a back window to take money from her purse and, as petitioner wiped his fingerprints off

the purse, he saw the victim in the hallway and cut her throat; and that petitioner stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that petitioner counted out approximately $290.00 he said he had taken from the victim's home and that petitioner asked Westberry to tell the police that he had spent the night of February 5 at Westberry's trailer. When Westberry related petitioner's confession to his wife several weeks later, she notified the police. The record reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to petitioner. Paul House testifed for the state that approximately one month before the murder, he and petitioner had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, petitioner denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, he stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. He testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. He also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence, but prior to final arguments, petitioner proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial; had gone to school with the petitioner's two sisters and had one

of the sisters to her house for dinner the previous Monday, where they discussed the trial and certain testimony. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to petitioner walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied petitioner's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made", after the witness has conferred with numerous people concerning the case.

Petitioner contended it was reversible error for the trial judge to deny the proffered witness an opportunity to testify. The record reveals that, during the hearing held by the trial court on the matter, the defense asserted that Waters' observation of three persons in the vicinity of the victim's home and one person walking on State Road 19 was relevant and exculpatory in that it tended to corroborate petitioner's otherwise uncorroborated testimony and could imply to the jury that others had an opportunity to break into the victim's home and kill her. While acknowledging that "there is no question that the violation of the rule [of sequestration] was inadvertent", the state argued that it "could very well be substantially prejudiced" if the witness was permitted to testify. The transcript of the hearing also reflects that the excluded witness did not become aware of the fact that she possessed relevant information until the morning her testimony was proffered, at which time she came forward of her own volition. In ruling to exclude the evidence, the trial judge attributed no "bad motive or bad faith" to the defense in its failure to proffer the testimony before the close of the evidence.

The jury found petitioner guilty as charged. Petitioner, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing as well as a

nine-year old psychological report which indicated that at that time he was depressed, emotionally immature, and had difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that petitioner receive the death sentence.

In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. The trial court found no mitigating circumstances.

On direct appeal to the Florida Supreme Court, the petitioner complained that: (1) the trial court committed reversible error and violated the sixth and fourteenth amendments to the United States Constitution and article 1, section 16 of the Florida Constitution, by refusing to allow him to re-open his case in order to present newly discovered exculpatory evidence, via the testimony of Waters, which was discovered after the technical close of all the evidence, but prior to any argument or instruction of law being given the jury; (2) the trial court erroneously found the aggravating circumstance of cold, calculated and premeditated murder, in that said finding was unsupported by the evidence and the finding constituted a doubling-up of the aggravating circumstance of especially heinous, atrocious or cruel murder and (3) as applied, section 921.141, Florida Statutes (1983), violates the sixth and fourteenth amendments to the United States Constitution by denying a defendant due process of law, in that the existence of aggravating and/or mitigating circumstances, as questions of fact, are found by the trial judge as opposed to a jury of the defendant's peers.

The convictions and sentences were affirmed by the Florida Supreme Court in Wright v. State, 10 F.L.W. 364 (Fla. July 3, 1985). The court found that the trial judge erroneously

applied the sequestration rule as a strict rule of law and failed to evaluate whether or not Waters' testimony was affected to any substantial degree by her presence in the courtroom or conversations with trial spectators. The court determined, however, that the error was harmless:

> Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house; that an individual of the appellant's general description was walking in the opposite direction from the victim's home, and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. See, United States v. Hasting, 461 U.S. 499 (1983); Chapman v. California, 386 U.S. 18 (1967); Gurganus v. State, 451 So.2d 817 (Fla. 1984). Cf. United States v. Webster, 750 F.2d 307 (5th Cir. 1984), cert denied, 105 S.Ct. 2340 (1985). United States v. Smith, 736 F.2d 1103 (6th Cir.), cert. denied, 105 S.Ct. 213 (1984).

10 F.L.W. 365-366.

The Florida Supreme Court agreed with the petitioner and found that the trial court erred in finding the murder to be cold, calculated and premeditated, but because the trial court properly found there were no mitigating and three aggravating circumstances, it was unnecessary to remand for a new sentencing hearing. 10 F.L.W. 366.

The Florida Supreme Court further noted that it had previously considered and expressly rejected the argument that the existence of aggravating and/or mitigating circumstances, as questions of fact, should be found by the jury rather than the trial judge. 10 F.L.W. 366.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

"This court can deal with a certain number of cases on the merits in any given Term, and therefore some judgment must attend the process of selection." Torres-Valencia v. United States, 104 S.Ct. 385, 78 L.Ed.2d 40 (1983)(Rehnquist, J., dissenting). If the alleged errors complained of had been committed by a federal court, the Court's assumption of jurisdiction arguably would be a proper exercise of its supervisory powers over the federal judicial system. See, Supreme Court Rule 17.1(a). Or if the case raised a novel question of federal law on which there was a divergence of opinion, the assumption of jurisdiction would be proper in order to clarify the law. Rule 17.1(b) and (c). Or if there were reason to believe that the state court refused to apply federal precedent because of its hostility to this Court's interpretation of the Constitution, the Court might have an obligation to act summarily to vindicate the supremacy of federal law. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). No such consideration is present in this case.

> A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT EXCLUSION OF THE TESTIMONY OF A DEFENSE WITNESS WHO HAD VIOLATED THE RULE OF SEQUESTRATION WAS HARMLESS ERROR AS THIS QUESTION IS SO EXPLICITLY FORECLOSED BY PRIOR DECISIONS OF THIS COURT AS TO LEAVE NO ROOM FOR REAL CONTROVERSY. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY, AND THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

While it would appear that a federal question was properly raised in the state court proceedings and that the highest state court passed upon the federal question, the petition for writ of certiorari cannot properly be granted on the basis of this claim. In the case sub judice, the federal question is so explicitly foreclosed by prior decisions of this Court, as to leave no room for real controversy. A review by this Court would involve only factual determinations applied under familiar legal rules, and, in fact, this Court's own prior decisions are controlling. Nothing has been shown by petitioner

to warrant a re-examination of settled principles. This Court has long held that a valid conviction need not be overturned by the mere presence of error that is harmless. United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

The decision below gave full consideration to the issues and decided them correctly. The facts of the case speak volumes as to why the exclusion of Waters' testimony was not harmful error. The petitioner confessed to Charles Westberry that he entered the victim's house through a back window to take money from her purse. Petitioner had entered the victim's home through that same window and stolen money one month before. He admitted to Westberry that he cut the elderly victim's throat because she recognized him and he did not want to return to prison. A sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to the petitioner. Contrary to petitioner's assertion, the evidence of guilt was not weak. That anyone in the world other than the defendant could have committed the crime is always an available theory. None of the three people alleged to have been walking down the victim's street after 12:00 p.m., confessed to the crime nor was there any evidence linking them to the crime, nor were they described as armed, dangerous or even suspicious. Waters herself opined that this was not an unusual place for people to be and she did not see them walking back down the street toward the victim's house (A. 50). This nebulous theory was placed before the jury at trial vis-a-vis the unrefuted testimony of another witness that three individuals were gathered near the victim's home. Repetition does not elevate the unpersuasive to the convincing. This cumulative evidence could not have reasonably changed the verdict, nor the exclusion of it have contributed to the conviction in the absence of some more compelling facts about these three unknown, unnamed and uncharacterized people.

Waters would also have testified that on the same evening, at the same time, an individual of the petitioner's

general description was walking in the opposite direction from the victim's home, and that she knew the petitioner and would have offered him a ride had she recognized the person on Highway 19 as the petitioner. The defense never contended that the proffered witness would purport to identify the petitioner as being the person she observed on the road, or that her testimony, if accepted by the jury, would require a finding by the jury that the petitioner did not commit the murder. The crux of Waters' entire testimony would reflect only that this is an area where numerous people walk, many of whom are unknown to Waters. There was more than sufficient evidence to convict the petitioner and placing the proffered testimony before the jury would have made the state's evidence no less damning and would certainly have not led to a conclusion that the petitioner was innocent.

An important consideration, is that the Florida Supreme Court, while finding such error to be harmless, did announce, however, that such actions violate both state and federal law. For this reason, the facts of this case are peculiar and not likely to recur, as the highest state court has made it abundantly clear to the lower courts that such an action, however well-meaning, is improper. In cases where such error is not harmless, reversal is virtually ensured. The issues, therefore, are not sufficiently important to warrant this Court's attention. Contrary to the petitioner's assertion, Florida does not apply its rule of sequestration to the detriment of defendants, and has expressly ruled that the rule of sequestration must not be enforced in such a manner that it produces injustice, and that the enforcement of such rule implicates the defendant's sixth amendment right to present witnesses in his own behalf. Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920); See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The instant Florida rule is designed merely to enhance the search for truth in the criminal trial. Moreover, this Court's decision in Holder v. United States, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893), makes it abundantly clear that a witness

cannot be excluded on the mere ground that he has disobeyed or violated a sequestration order. The decision below is in accordance with this decision and there is no reason to believe that the state court refused to apply federal precedent because of its hostility to this Court's interpretation of the constitution. Furthe., the exclusion of such non-probative evidence is harmless error in accordance with the dictates of other decisions of this Court. The petitioner's assertion that the Florida Supreme Court applied the wrong test in determining harmless error, constitutes mere semantic dueling. A conclusive finding that the excluded evidence would not have affected the verdict encompasses the lesser conclusion that there is no reasonable possibility that the evidence complained of might have contributed to the conviction.

B. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES AS QUESTIONS OF FACT MAY BE FOUND BY THE TRIAL JUDGE RATHER THAN BY THE JURY AS THIS QUESTION HAS BEEN DISPOSED OF BY THIS COURT ON NUMEROUS OCCASIONS.

The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.).

The petitioner contends that this Court has never addressed the issue of whether the trial judge rather than the jury can find the existence of aggravating or mitigating circumstances in regard to the sixth amendment guarantee to a trial by jury on issues of guilt in all criminal prosecutions. This Court, however, stated in Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3162 (1984):

> . . . The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth

> Amendment's guarantee of a jury trial. The Court's concern in Bullington was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. 451 U.S., at 445, 101 S.Ct., at 1861. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. Arizona v. Rumsey, supra. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding -- a determination of the appropriate punishment to be imposed on an individual. See, Lockett v. Ohio, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-1965, 57 L.Ed.2d 973 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), citing Pennsylvania ex rel. Sullivan, v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937), and Williams v. New York, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

The petitioner next contends that Florida's sentencing procedure conflicts with the spirit of Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), as "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." The Court, however, also addressed this issue in Spaziano, supra:

> Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. See, e.g., Gregg v. Georgia, supra; Woodson v. North Carolina, 428 U.S., at 302-303, 96 S.Ct., at 2990-2991; Zant v. Stephens, __U.S., at __, 103 S.Ct. at 2744. The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. See, Gregg v. Georgia, 428 U.S., at 183-184, 96 S.Ct. at 2929-2930

(joint opinion); Furman v. Georgia, 408 U.S. at 394-395, 92 S.Ct., at 2806-2807 (BURGER, C.J., dissenting); Id.,at 452-454, 92 S.Ct., at 2835-2836 (POWELL, J., dissenting).

* * *

> We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. See, Gregg v. Georgia, 428 U.S., at 181, 96 S.Ct., at 2928 (joint opinion); Williams v. Florida, 399 U.S. 78, 100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446 (1970); Duncan v. Louisiana, 391 U.S., at 156, 88 S.Ct., at 1451; Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775, n.15, 20 L.Ed.2d 776 (1968). The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.

104 S.Ct. at 3164.

The functioning of the jury in the sentencing phase is not the same as the function of the jury in the guilt phase. The role of the jury is merely advisory and there is no reason for the jury to make findings of fact as to the appropriateness of imposing the death sentence, when the trial judge and not the jury is the sentencer. This Court in Proffitt, supra, approved the role of the jury under Florida's death penalty statute as advisory only. Petitioner's arguments reflect only the long held wish for the jury as sentencer urged upon this Court previously. This question is so explicitly foreclosed by prior decisions of this Court as to leave no room for real controversy.

CONCLUSION

Petitioner raised two questions which urge review by this Court. Respondent respectfully submits each fails to demonstrate that review is necessary, or that a substantial federal question is involved. To the extent that this Court may conclude otherwise, the State of Florida submits that the decision rendered by the Florida Supreme Court in this cause is clearly correct; that this Court should deny plenary review; and, that it should summarily affirm the decision of the Florida Supreme Court.

ty dollars ($20) court costs on each case (a total of $60) court costs.

[Respondent's] conduct in this matter was directly related to the psychological and emotional conditions of [respondent], which is now being professionally treated. The Florida Bar, Case No. 86B84H49, which is presently before the Pasco County Grievance Committee, Sixth Judicial Circuit, "B", is based upon the conduct that was the subject of criminal charges.

3. The [respondent] hereby waives confidentiality of this proceeding and of all pending disciplinary matters, pursuant to Florida Bar Integration Rule, article XI, Rule 11.02(4)(a).

4. [Respondent] agrees to cooperate fully with investigations made in connection with the Client Security Fund of The Florida Bar.

5. [Respondent] will make all reasonable efforts to reimburse those who suffered monetary losses as a result of his failure to perform in his professional capacity or professional misconduct. [Respondent] will also make all reasonable efforts to reimburse the Client Security Fund of The Florida Bar for payments made by the Fund as a result of his conduct.

6. [Respondent] freely and voluntarily submits this Petition to Resign and further agrees that it is without leave to reapply for readmission for a period of three (3) years or until such time as [respondent] has completed his term of probation and both The Florida Bar and [respondent's] primary treating psychologist feel that [respondent] is emotionally capable of resuming the active practice of law.

The Florida Bar having stated that it does not oppose the Petition for Leave to Resign and the Court having reviewed the Petition and determined that the requirements of Rule 11.08(3) are fully satisfied, the Petition for Leave to Resign is hereby approved. This resignation shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients and respondent shall not accept any new business.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

* * *

Attorneys—Discipline—Conduct involving dishonesty, fraud, deceit or misrepresentation—Conduct adversely reflecting on fitness to practice law—Suspension

THE FLORIDA BAR, Complainant, vs. DONALD J. SWANSON, Respondent. Supreme Court of Florida. Case No. 65,839. July 3, 1985. Original Proceeding—The Florida Bar: John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida, and Jacqueline Plasencia Nesbitt-Imas, Bar Counsel, Fort Lauderdale, Florida, for Complainant. Robert J. O'Toole, Fort Lauderdale, Florida, for Respondent.

(PER CURIAM.) This disciplinary proceeding by The Florida Bar against Donald J. Swanson, a member of The Florida Bar, is presently before us on complaint of The Florida Bar and report of referee. Pursuant to article XI, Rule 11.06(9)(b) of the Integration Rule of The Florida Bar, the referee's report and record were duly filed with this Court. No petition for review pursuant to Integration Rule of The Florida Bar 11.09(1) has been filed.

Having considered the pleadings and evidence, the referee found respondent guilty of Count One of the Complaint of The Florida Bar as to each ethical violation: Disciplinary Rule 1-102(a)(1)—A lawyer shall not violate a disciplinary rule; Disciplinary Rule 1-102(a)(4)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and Disciplinary Rule 1-102(a)(6)—A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law. The referee further found respondent not guilty as to Count Two of the Complaint of The Florida Bar as to each of the same ethical violations.

The referee recommends that respondent be suspended from the practice of law for a fixed period of twelve months and thereafter, until:

1. He shall prove his rehabilitation pursuant to Rule 11.10(4).

2. Enroll in, and successfully complete with a grade of no less than "C", or its equivalent, from an accredited law school in the State of Florida, a course in Ethical Conduct by attorneys authorized to practice law in the State of Florida.

3. Pay the costs of these proceedings in the amount of $1,642.83.

Having carefully reviewed the record, we approve the findings and recommendations of the referee.

Accordingly, respondent, Donald J. Swanson is suspended from the practice of law for a period of twelve (12) months on the conditions set forth above. Respondent's suspension shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients. Respondent shall not accept any new business.

Judgment for costs in the amount of $1,642.83 is hereby entered against respondent, for which sum let execution issue.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

* * *

Criminal law—Murder—Death penalty—Error to exclude testimony of witness who came forward on own volition after attending portions of trial, following newspaper accounts of trial and discussing testimony with various persons who attended trial without conducting inquiry as to whether inadvertent violation of sequestration rule affected witness' testimony—Error harmless under circumstances—Evidence of defendant's participation in prior burglary of victim's home utilizing identical point of entry used on date of victim's murder properly admitted—Sentencing—Aggravating circumstances—Proper to find murder committed after rape and burglary and murder heinous, atrocious or cruel—Proper to find murder committed for purpose of avoiding arrest where evidence reflected that defendant murdered victim because she could identify him and he did not want to return to prison—Error to find murder committed in cold, calculated and premeditated manner—Death sentence properly imposed—Imposition of death penalty proportionately correct

JOEL DALE WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 64,349. July 3, 1985. An Appeal from the Circuit Court in and for Putnam County, James B. Odom, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant. Jim Smith, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

(PER CURIAM.) The appellant, Joel Dale Wright, was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. In accordance with the jury's sentence recommendation, the trial judge imposed the death sentence for the first-degree murder. The appellant also received sentences of 99 years for sexual battery, 15 years for burglary, and 5 years for grand theft. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and sentences.

The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window in the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the victim.

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tim, that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat, and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the jury on the *Williams* rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other almost as if that testimony were 'tailor-made,' after the witness has conferred with numerous people concerning the case." The jury found appellant guilty as charged.

Appellant, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year-old psychological report which indicated that at that time appellant was depressed, emotionally immature, and had difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that appellant receive the death sentence.

Guilt Phase

The appellant challenges his first-degree murder conviction on the grounds that the trial court erred in: (1) restricting appellant's right to cross-examine several witnesses, (2) permitting a witness to comment upon appellant's exercise of his right to remain silent, (3) restricting defense counsel's final argument and/or refusing to instruct the jury on the law governing circumstantial evidence, (4) refusing to allow the appellant to present the testimony of Kathy Waters, and (5) instructing the jury to consider evidence of appellant's prior burglary of the victim's house. Appellant also challenges his grand theft conviction on the ground that the corpus delicti was not established other than by appellant's confession. We reject each of appellant's contentions and find only the issues relating to the exclusion of Waters' testimony and the admissibility of the *Williams* rule evidence merit discussion.

With regard to the first issue for discussion, appellant contends it was reversible error for the trial judge to deny the proffered witness an opportunity to testify. The record reveals that, during the hearing held by the trial court on the matter, the defense asserted that Waters' observation of three persons in the vicinity of the victim's home and one person walking on State Road 19 was relevant and exculpatory in that it tended to corroborate appellant's otherwise uncorroborated testimony and could imply to the jury that others had an opportunity to break into the victim's home and kill her. While acknowledging that "there is no question that the violation of the rule [of sequestration] was inadvertent," the state argued that it "could very well be substantially prejudiced" if the witness was permitted to testify. The transcript of the hearing also reflects that the excluded witness did not become aware of the fact that she possessed relevant information until the morning her testimony was proffered, at which time she came forward of her own volition. In ruling to exclude the evidence, the trial judge attributed no "bad motive or bad faith" to the defense or its failure to proffer the testimony before the close of the evidence. In declaring that the sequestration rule would be rendered "meaningless" if the witness were allowed to testify, it is clear that the trial judge applied that rule as a strict rule of law. This Court has frequently pointed out that the rule of sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding. *See Strickhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Calhoun v. State*, 403 So. 2d 936 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); *Dumas v. State*, 350 So. 2d 464 (Fla. 1977); *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962). We have expressly stated the rule must not be enforced in such a manner that it produces injustice. *Sirfluvia v. State*, 80 Fla. 309, 86 So. 204 (1920). Further, we have recognized that enforcement of the rule against a defendant seeking to introduce the testimony of a witness who has heard testimony in violation of the rule implicates the defendant's sixth amendment right to present witnesses in his own behalf. *See Strickhorst; cf. Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). Before it excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness's testimony was affected by other witnesses' testimony to the extent that it substantially differs from what it would have been had the witness not heard the testimony. Because of the sixth amendment ramifications, the court must carefully apply this test before it excludes any material testimony offered by a defendant in a criminal case, and should also consider whether the violation of the rule of sequestration was intentional or inadvertent and whether it involved bad faith on the part of the witness, a party, or counsel. In the instant case, the trial judge found the violation was inadvertent, but failed to evaluate whether or not Waters' testimony was affected to any substantial degree by her presence in the courtroom or conversations with trial spectators. We realize that trial courts must, of necessity, have discretion in the enforcement of the rule of sequestration. In the instant case, we find the trial judge erred in failing to exercise his discretion to determine whether exclusion was warranted under the circumstances, and, instead, applied the sequestration rule as a strict rule of law.

Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house, that an individual of the appellant's general description was walking in the opposite direction from the victim's home, and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contains unrefuted testimony that three individuals were gathered near the vi-

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tim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. *See United States v. Hasting*, 461 U.S. 499 (1983); *Chapman v. California*, 386 U.S. 18 (1967); *Gurgonus v. State*, 451 So. 2d 817 (Fla. 1984). *Cf. United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2340 (1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

The second issue concerns appellant's assertion that the trial court committed reversible error by allowing the jury to consider evidence of a prior crime committed by appellant "for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant."* In *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959), this Court held that evidence of another crime is admissible when relevant to prove a material issue, unless it is relevant only to show bad character or propensity. *See also Shriner v. State*, 386 So. 2d 525 (Fla. 1980), *cert. denied*, 449 U.S. 1103 (1981). *Ashley v. State*, 265 So. 2d 685 (Fla. 1972). The *Williams* holding is codified by section 90.404(2)(a), Florida Statutes (1983), and incorporated into Florida Standard Jury Instructions. In *Drake v. State*, 400 So. 2d 1217 (Fla. 1981), we stated that to be legally relevant to show identity, it is not enough that the factual situations sought to be compared bear a "general similarity" to one another. Rather, the situations must manifest "identifiable points of similarity." *Id.* at 1219. We find the evidence that appellant had previously burglarized the victim's house and, in so doing, had utilized the identical point of entry used on the date of the victim's murder, is, under the *Williams* rule, legally relevant to show identity and to show that Wright knew that point of entry was available. We also note that appellant utilized this evidence in testifying that his fingerprint had been left in the victim's bedroom when he and Paul House burglarized her residence.

Sentencing Phase

In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances. The appellant raises four challenges to the sentencing phase of his trial: (1) the trial court erred in finding that the murder was committed for the purpose of preventing a lawful arrest; (2) the trial court erred in finding that the murder was cold, calculated, and premeditated; (3) section 921.141, Florida Statutes (1983), violates the federal constitution by depriving the appellant of his right to a trial by his peers; and (4) Florida's capital sentencing statute is unconstitutional on its face and as applied. We have previously considered and expressly rejected the latter two arguments. *See, e.g., Johnson v. State*, 393 So. 2d 1069 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981); *Proffitt v. Florida*, 428 U.S. 242 (1976), *aff'g* 315 So. 2d 461 (Fla. 1975).

Appellant's first contention is without merit. He argues that, because the victim was not a law enforcement officer, the trial judge's finding that the murder was committed to prevent arrest is defective because it fails to show that the dominant motive was the elimination of a witness. The record reflects that Westberry testified appellant admitted he killed the victim because she recognized him and he did not want to return to prison. This evidence supports the trial judge's finding that appellant committed the capital felony for the purpose of avoiding arrest. *See Clark v. State*, 443 So. 2d 973 (Fla. 1983), *cert. denied*, 104 S. Ct. 2400 (1984); *Johnson v. State*, 442 So. 2d 185 (Fla. 1983), *cert. denied*, 104 S. Ct. 2182 (1984); *Vaught v. State*, 410 So. 2d 147 (Fla. 1982).

We agree with appellant's assertion that the trial court erred in finding the murder to be cold, calculated, and premeditated. This aggravating circumstance is generally found in murders that, by the nature, exhibit a heightened degree of premeditation, such as contract or execution-style murders. *See Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *Washington v. State*, 432 So. 2d 44 (Fla. 1983); *McCray v. State*, 416 So. 2d 804 (Fla. 1982). Such heightened premeditation was not proved beyond a reasonable doubt in this case. Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct and find it unnecessary to remand for a new sentencing hearing. *See James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 105 S. Ct. 608 (1984); *White v. State*, 403 So. 2d 331 (Fla. 1981), *cert. denied*, 103 S. Ct. 3571 (1983); *Demps v. State*, 395 So. 2d 501 (Fla.), *cert. denied*, 454 U.S. 933 (1981); *Elledge v. State*, 346 So. 2d 998 (Fla. 1977). We also find the imposition of the death penalty in this case is proportionately correct. *See, e.g., Stewart v. State*, 420 So. 2d 862 (Fla. 1982), *cert. denied*, 460 U.S. 1103 (1983); *Booker v. State*, 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 93 (1981); *King v. State*, 390 So. 2d 315 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981), *receded from on other grounds, Strickland v. State*, 437 So. 2d 150 (Fla. 1983).

For the reasons expressed, we affirm appellant's convictions and sentence of death.

It is so ordered. (BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur.)

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*See Fla. Std. Jury Instr. (Crim.), "Williams Rule." That instruction reads:

> The evidence you are about to receive concerning the alleged commission of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the [information] [indictment].

We agree with appellant that the trial judge would have been well-advised to have his instruction to those bracketed elements that were applicable under the facts of the case; however, the judge's failure to so have the instruction was not error.

* * *

Attorneys—Discipline—Permanent resignation pending disciplinary proceedings

THE FLORIDA BAR, Complainant, vs. LLOYD AUSTIN LYDAY, Respondent. Supreme Court of Florida. Case No. 66,747. July 3, 1985. Original Proceeding—The Florida Bar, David R. Ratcliff, Bar Counsel, Tampa, Florida, for Complainant; and Edwin T. Mulock of Mulock and Barkdull, Bradenton, Florida, for Respondent.

(PER CURIAM.) This matter is before the Court on respondent's Petition and Amended Petition for Leave to Resign pending disciplinary proceedings, pursuant to article XI, Rule 11.08 of the Integration Rule of The Florida Bar.

Respondent states in his petition that Florida Bar Case Nos. 12B85H38 and 12B85H39 are pending against him and Florida Bar Case No. 12B85H02 was a past disciplinary action against him which was resolved by an admission of minor misconduct which was accepted by the grievance committee. Respondent further states that there are no original proceedings pending against him and that his resignation is of a permanent nature.

The Florida Bar filed its response stating that it supports respondent's Amended Request for Leave to Resign permanently and that

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SUPREME COURT OF THE UNITED STATES

JOEL DALE WRIGHT *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 85–5747. Decided January 21, 1986

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I would grant certiorari in this capital case to ensure that the Florida courts have not sentenced a man to die based on a conviction obtained in violation of the Sixth Amendment.

On February 6, 1983, a woman was found murdered in the bedroom of her home. She apparently had died the previous night after being raped and stabbed. All the doors to her home were locked, but a back window was found open. Several weeks later, Charles Westberry told his wife that petitioner Joel Wright had come to Westberry's trailer shortly after daylight on the morning of February 6 and had confessed to killing the victim. Wright lived with his parents near the victim's home. Westberry's wife notified the police, and Wright was arrested and tried for the crime. At trial, Westberry was the State's principal witness. He testified that Wright had told him on the morning of February 6 that Wright had entered the victim's house through the back window to steal money, that the victim had discovered him as he was wiping his fingerprints from her purse, and that he had killed her because he did not want to return to prison. According to Westberry, Wright counted out $290 he claimed to have taken from the victim's home, and he asked Westberry to tell the authorities that Wright had spent the previous night at Westberry's trailer. Another witness for the State testified that, approximately one month before the murder, he and Wright had stolen money from the victim's home after entering through the window later found open on

February 6. The jury also was told that a fingerprint identified as Wright's had been found on a portable stove in the victim's bedroom.

Wright took the stand and denied involvement in the murder. He testified that he had returned home from a party at approximately 1 a.m. on February 6, but had found himself locked out. He claimed that he then had walked along Highway 19 to Westberry's trailer, where he had spent the night. He also presented a witness who testified that, late on the night of February 5 and early in the morning of February 6, he had seen a group of three men, whom he had not recognized, in the general vicinity of the victim's home.

After the close of evidence but prior to final arguments, the defense moved to re-open the case in order to introduce the testimony of a newly discovered witness, Kathy Waters. Waters apparently had read newspaper accounts of the trial, had listened to parts of the testimony, and had discussed the trial with friends in attendance. She offered to testify that, shortly after midnight on February 6, she had seen a person who could have been Wright walking along Highway 19, and had also observed three persons she did not recognize near the victim's home. Waters claimed that she had not realized she possessed relevant information until the morning her testimony was proffered, and that she had come forward of her own volition. The trial judge denied Wright's motion, noting that Florida's sequestration rule would be rendered "meaningless" if, after discussing the case with others, a witness were permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made." Although the State acknowledged that the violation of the sequestration rule had been inadvertent, it argued that the prosecution "could very well be substantially prejudiced" if Waters were permitted to testify. Wright was convicted and sentenced to die.

On appeal, the Supreme Court of Florida held that the trial judge's rigid application of the State's sequestration rule

was inconsistent with Wright's Sixth Amendment right to present witnesses in his behalf. The court affirmed the conviction, however, because it deemed the error harmless:

> "The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify [Wright] as the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that [Wright] did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt." 473 So. 2d 1277, 1280–1281 (1985).

The State Supreme Court thus recognized that a conviction resulting from a trial marred by constitutional error must be reversed unless the error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S. 18, 24 (1967); see also, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499 (1983). It seems to me, however, that the court failed to show the requisite attentiveness to the possibility of prejudice. A constitutional violation may be excused under *Chapman* only if the State "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S., at 24. It is not sufficient for a reviewing court to conclude, as the Supreme Court of Florida appears to have done in this case, that in its judgment the error did not change the verdict. The question is whether the State has disproved any "reasonable possibility" that the error made a difference. *Id.*, at 24; *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963).

The State of Florida may well be able to carry that burden in this case, but nothing in the Supreme Court's opinion or in the State's brief before this Court convinces me that it has done so. Since Wright's fingerprint could have been left during the alleged earlier break-in, this case comes down to

Wright's word against Westberry's. Waters' testimony obviously would not have proved Wright innocent, but it would have provided some corroboration for Wright's story. Questions of witness credibility, of course, are within the "special province" of the factfinder, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 856 (1982), and I cannot say "beyond a reasonable doubt" that the corroboration Waters offered could not have altered the jury's assessment of the conflicting stories. More to the point, I do not see how the Supreme Court of Florida could make that statement, particularly given the prosecution's claim of potentially substantial prejudice and the trial judge's suggestion that Waters' testimony appeared almost "tailor-made" for the defense.

The *Chapman* rule was meant to be more than merely a formula to incant before affirming the results of constitutionally infirm prosecutions. For the rule to have content, a reviewing court must not declare a constitutional error harmless without first conducting a careful and probing inquiry into the possibility of prejudice. Nothing less will suffice if the court is to be convinced "beyond a reasonable doubt" that the error had no effect on the verdict. Furthermore, at least in any case where the harmlessness of an error is as questionable as it is here, an appellate court should spell out its reasoning in sufficient detail to permit this Court to verify compliance with *Chapman*. Our concern of course must be not merely that *Chapman* is cited, but that it is followed conscientiously. For me, that concern is not satisfied by the opinion of the Florida Supreme Court in this case, particularly given the sentence imposed. Consequently, I would grant certiorari, vacate the judgment, and remand for a determination whether there is any "reasonable possibility" that the automatic exclusion of Waters' testimony contributed to Wright's conviction.